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IN THE COURT OF APPEALS OF INDIANA

THOMAS A. YOHE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A04-0610-CR-550
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0307-FA-6639

July 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Thomas Yohe appeals his convictions for Class A felony kidnapping, Class B felony burglary, and Class B felony robbery. We affirm.

Issues

Yohe raises four issues, which we restate as:

I. whether his convictions for burglary and robbery violate double jeopardy;

II. whether his convictions for burglary and robbery violate the "continuous criminal episode doctrine";

III. whether the trial court properly denied his motions for discharge or release on his own recognizance; and

IV. whether he was improperly deprived of his right to counsel.

Facts

In the early morning hours of July 19, 2003, Margaret Smallman was asleep on her couch in Portage while her children slept in their bedrooms. She awoke when she heard her front door open and saw Yohe, a stranger, come inside her apartment. Yohe got next to her, put a knife to her throat, told her to shut up, and asked her for money. Smallman got money out of her purse and gave it to him. Yohe asked if the car parked in the driveway worked, and she told him it did.

Yohe continued to hold a knife to Smallman's throat and forced her into the car. He headed east on Interstate 80. He got off the road at exit 110 in Ohio. While they were stopped in traffic at the tollbooth, Smallman jumped out of the car and ran into an office. Yohe was eventually apprehended by the Ohio State Highway Patrol.

On July 31, 2003, the State charged Yohe with Class A felony kidnapping, Class B felony burglary, and Class B felony robbery. From 2003 to 2005, four different attorneys were appointed to represent Yohe, two of whom withdrew their appearances because they had a conflict with Yohe. On December 19, 2005, Dolores Aylesworth was appointed to represent Yohe. On January 30, 2006, a trial date of July 31, 2006, was set.

On April 28, 2006, Yohe moved to be discharged or to be released on his own recognizance because he had not yet been tried. After a hearing, these motions were denied. On July 31, 2006, a jury trial began, and Yohe was found guilty as charged. He was then sentenced to forty years on the kidnapping conviction and twenty years each on the burglary and robbery convictions. The trial court ordered the sentences to be served consecutively for a total sentence of eighty years. Yohe now appeals.

Analysis

I. Double Jeopardy

Yohe argues that his convictions for robbery and burglary violate the prohibition against double jeopardy in Article I, Section 14 of the Indiana Constitution. He asserts that the two convictions violate the actual elements test of Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999). "The Indiana Double Jeopardy Clause prohibits multiple convictions if there is '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.'" Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002) (quoting Richardson, 717 N.E.2d at 53).

To convict Yohe of Class B felony burglary, the State was required to prove that: (1) he broke and entered (2) Smallman's house (3) with the intent to commit a felony therein (4) while armed with a deadly weapon. See Ind. Code § 35-43-2-1. To convict Yohe of Class B felony robbery, the State was required to show that he: (1) knowingly or intentionally (2) took property (3) from Smallman (4) by use of force or threat of force (5) while armed with a deadly weapon. See I.C. § 35-42-5-1.

In Pierce, our supreme court addressed double jeopardy concerns in terms of Class A felony burglary and Class B felony robbery where the same bodily injury was used to enhance both offenses. Pierce, 761 N.E.2d at 829-30. The Pierce court observed, "Each of these crimes includes evidence or facts not essential to the other. The taking of money supports the robbery and the breaking and entering supports the burglary, but neither is an element of the other crime."[1] Id. at 830.

Here, Yohe committed burglary when he broke and entered Smallman's house while armed with a deadly weapon with the intent to commit robbery, a felony. He committed robbery when he took money from Smallman by holding a knife to her throat. As in Pierce, the taking of the money supports the robbery conviction, and the breaking and entering supports the burglary conviction. Neither is an element of the other crime. Accordingly, Yohe's double jeopardy rights were not violated.

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[1] The Pierce court did reduce the Class B felony robbery conviction to a Class C felony based on the long adhered to series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson. Pierce, 761 N.E.2d at 830. "Among these is the doctrine that where a burglary conviction is elevated to a Class A felony based on the same bodily injury that forms the basis of a Class B robbery conviction, the two cannot stand." Id. This doctrine is not at issue here.

II. "Continuous Criminal Episode Doctrine"

Yohe also argues that even if his convictions for burglary and robbery do not violate double jeopardy, they violate the "continuous criminal episode doctrine." Appellant's Br. p. 14. As the State points out, Yohe seems to be combining two theories. One involves single episodes of criminal conduct and the other is the continuing crime doctrine. We find Yohe's claims to be unavailing in any event.

Regarding a single episode of criminal conduct, Indiana Code Section 30-50-1-2(c) prohibits the imposition of consecutive sentences under certain circumstances. Excepted from this limitation on consecutive sentences, however, are crimes of violence. Kidnapping, Class B felony burglary, and Class B felony robbery are included in the list of crimes of violence. I.C. § 35-50-1-2(a). Therefore, consecutive sentences may be imposed for such offenses. Even if Yohe's actions amounted to a single episode of criminal conduct, the trial court did not err in ordering these sentences to be served consecutively because they are crimes of violence.

Further, the continuous crime doctrine defines those instances where a defendant's conduct amounts only to a single chargeable crime. Boyd v. State, 766 N.E.2d 396, 400 (Ind. Ct. App. 2002). "In doing so, the continuous crime doctrine prevents the state from charging a defendant twice for the same continuous offense." Id. Generally, "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." Riehle v. State, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005), trans. denied.

Here, the burglary, robbery, and kidnapping are separate crimes, not a single ongoing crime. Yohe, a stranger to Smallman, committed a burglary when he entered her house in the middle of the night while she and her children were asleep with the intent to rob her. At that point the commission of the burglary was complete in that even if he had turned and walked out of Smallman's house, he committed the crime of burglary. Then, when Yohe approached Smallman, held a knife to her throat, and demanded she give him money, which she did, he committed robbery. This crime occurred separate and apart from Yohe's breaking and entering into Smallman's house. Finally, Yohe kidnapped Smallman when he obtained the keys to her car, forced her in it by knifepoint, and drove to Ohio. This crime is distinct from the burglary and robbery. Because each crime is independent of the other, the State properly charged Yohe with burglary, robbery, and kidnapping.

III. Indiana Criminal Rule 4(C)

Yohe argues that he was denied a speedy trial because no trial date was set from August 12, 2003, to February 2, 2004, and from January 31, 2005, to January 30, 2006. Indiana Criminal Rule 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided

> further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The duty to bring a defendant to trial within one year is an affirmative one that rests with the State. State v. Huber, 843 N.E.2d 571, 573 (Ind. Ct. App. 2006), trans. denied. The defendant has no obligation to remind the court of the State's duty, nor is the defendant required to take any affirmative action to see that he or she is brought to trial within the period. Id. Whether delays in the scheduling of the trial have occurred and to whom they are chargeable are factual determinations for the trial court. Id.

In determining whether a delay is attributable to the defendant, the time between the defendant's motion to continue and the new trial date is chargeable to the defendant. Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999). "If a defendant's actions cause his attorney's resignation or withdrawal, then the defendant is charged with that delay." Id.

Although Yohe focuses on the setting of a trial date, our supreme court has held "that delays caused by action taken by the defendant are chargeable to the defendant regardless of whether a trial date has been set." Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004). Here, there are extensive delays attributable to Yohe.

Yohe was charged on July 31, 2003. On August 26, 2003, John Martin entered an appearance on Yohe's behalf. On October 24, 2003, Peter Boyles substituted his appearance for Martin. On January 5, 2004, March 29, 2004, and May 24, 2004, Boyles

moved for continuances. On July 26, 2004, a jury trial was reset for November 15, 2004. On October 25, 2004, Boyles asked for the trial to be reset, and it was reset for February 22, 2005.

On January 31, 2005, Boyles moved to withdraw his appearance, and the trial court granted the motion that same day. At some point Gary Germann was appointed to represent Yohe.[2] On February 4, 2005, the chronological case summary provides that "deft by counsel files motion to continue jury trial." App. p. 11. A status hearing was set for March 14, 2005, which the defendant sought to continue; that hearing was reset for March 28, 2005, the day Germann moved to withdraw his appearance.

A hearing on Germann's motion was held on June 28, 2005, at that hearing, Germann indicated that Boyles withdrew because of conflict created by Yohe. Germann also stated he was seeking to withdraw because of Yohe's actions. Specifically, Germann noted, "attorneys just simply can't remain on the case when a conflict of interests is created, and created by the defendant himself." June 28, 2005 Hearing Tr. p. 4. Germann did not explain the details of the alleged conflicts because of their privileged nature, but it appears that Yohe filed a complaint against Boyles with the disciplinary commission and at least insinuated to Germann that he was going to file a complaint against him. At the hearing, Germann stated:

> As I had indicated earlier, it is obvious to me also, Your Honor, that in order for an attorney to represent Mr. Yohe, it would be necessary virtually to have a court reporter

[2] The chronological case summary does not indicate that Germann filed a notice of his appearance. Nevertheless, it is undisputed that Germann represented Yohe for a period of time.

> accompany the lawyer every time that a conversation were to take place with the defendant to assure the accuracy of what was said, the responses, even though that record may remain confidential. And that would be my advice to any lawyer subsequent to myself and it would be the same advice I would give myself.
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> * * * * *
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> I do not believe that a lawyer, even a public defender, should be in certain situations subjected to potential future litigation, which acts as a detriment to the public defender's office, to the system, and to the prosecutor's office, because I understand that they have a substantial interest, they the prosecutor's office, and the state of Indiana has a substantial interest in this case, because of the seriousness of the case.

Id. at 5-6. In addition to Germann's statements to the trial court, the head of the Porter County Public Defender's Office stated:

> Judge, as the court knows, I've been a public defender for a good many, many years, several decades. And the court knows we handle the most difficult cases, and the most difficult clients. And we're used to difficult communications. We're used to, you know, I want a real lawyer. We've been through all this.
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> * * * * *
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> In all the years I've been here, I think I can count on one finger the cases where we've come to a court and said we want to disqualify our office. And that's this case. It's not a matter of practice.

Id. at 12. That same day, the trial court ordered that Yohe, "by his conduct, has waived the right to have counsel provided by the Court. The Court orders that Defendant obtain his own counsel or proceed pro-se." App. p. 94.

At a November 21, 2005 status hearing, Yohe asked the trial court to appoint counsel to represent him. The trial court said it would reconsider its previous ruling and inform Yohe of its decision at the December 12, 2005 status hearing. At the December 12, 2005 hearing, the trial court indicated that a public defender from the Porter County Public Defender's Office would be appointed to represent Yohe. On December 19, 2005, Aylesworth entered her appearance.

The substantial delays in this case arose out of Yohe's actions. The delays from the January 5, 2004 motion to continue until Aylesworth entered her appearance on December 19, 2005 are all attributable to Yohe. Thus, according to the State's calculation, when Aylesworth entered her appearance, the State had 191 days remaining to try Yohe.[3]

On January 30, 2006, a status hearing was held at which the parties discussed setting a trial date. The trial court observed that Aylesworth was relatively new to the case. Aylesworth asked to work with the court's calendar. After a bench conference off the record, the trial court set the trial for July 31, 2006. This fell outside the one-year period for trying the case. However, at no point did Yohe, who was present, or Aylesworth object to the setting of the trial date outside of the Indiana Criminal Rule 4(C) time period.

Our supreme court has held, "When a trial court, acting within the one-year period of the rule, schedules trial to begin beyond the one-year limit, the defendant must make a

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[3] Our calculations are not consistent with the State's. In fact, it appears that the State had more time to try Yohe. However, the discrepancies do not affect the outcome of our decision.

timely objection to the trial date or waive his right to a speedy trial." Vermillion, 719 N.E.2d at 1204. "The defendant's failure to object timely will be deemed acquiescence in the setting of that date." Id.

Because time remained in which Yohe could be tried when trial was set for July 31, 2006, Yohe acquiesced to the setting of the trial outside of the Indiana Criminal Rule 4(C) deadline. Yohe's subsequent April 28, 2006 motion to discharge was not a timely objection to the setting of the trial date. The trial court properly denied Yohe's motion for discharge.

IV. Waiver of Right to Counsel

Finally, Yohe argues that he was improperly denied the right to counsel from June 28, 2005, until December 12, 2005. We disagree. As discussed above, Yohe's actions left the trial court with little option but to allow the Porter County Public Defender's Office to withdraw its representation of Yohe. Nevertheless, the trial court reconsidered its decision and reappointed a public defender to represent him. Unlike in Fitzgerald v. State, 254 Ind. 39, 48-49, 257 N.E.2d 305, 312 (1970), upon which Yohe relies, Yohe was not tried without the assistance of counsel. Yohe has not established he was improperly denied his right to counsel.

Conclusion

Yohe's convictions for burglary and robbery do not violate double jeopardy. His commission of burglary, robbery, and kidnapping are crimes of violence for purposes of Indiana Code Section 35-50-1-2 and do not violate the continuous crime doctrine.

Yohe's rights under Indiana Criminal Rule 4(C) were not violated, and he was not denied the assistance of counsel. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.