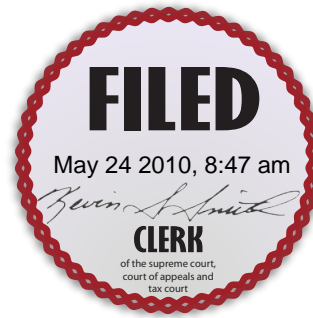


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

McCONNEY J. GEORGE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0905-CR-465

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0811-FB-57

MAY 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant McConney J. George appeals the sentence imposed upon his convictions of robbery resulting in the bodily injury of Alan Madary, a Class B felony and robbery resulting in the bodily injury of Jennifer Corwin, a Class B felony. We reverse and remand with instructions.

ISSUE

The following issue is dispositive: whether part of the sentence should be vacated pursuant to the continuing crime doctrine.

FACTS AND PROCEDURAL HISTORY

At approximately midnight on March 2, 2008, George and Shamone Evans entered a Dominos Pizza in Tippecanoe County and confronted Alan Madary, a Dominos delivery driver, and Jennifer Corwin, the assistant manager. George and Evans ordered Madary and Corwin to put their hands up and to “give us all your money.” (Tr. 73-74). George pointed a gun at Madary’s face, causing Corwin to believe that George and Evans were going to murder them. Madary was instructed to lay on the floor, and George hit him on the top of the head with the butt of the gun, then kicked him in the head, causing him to start bleeding. George also put his foot on Madary’s head to keep Madary from moving.

Evans demanded money from Corwin and punched her in the face, causing pain and a black eye. Corwin opened the cash register, and Evans took all the money. Evans

demanded more money, so Corwin unlocked the manager's box, and Evans took the money from the box.

Three store phones were ripped from the walls, and George took Madary's cell phone. Before the men left, Evans ordered Madary and Corwin to stay on the floor, claiming that they had someone watching the store. After waiting, Madary used Corwin's cell phone to call 911.

An investigation of the incident led the police to interview both George and Evans. George admitted to his involvement in the incident. Evans also confessed, and at George's trial, he named George as his partner in the robbery. Evans accepted a twenty-five year executed plea to wrap up four unrelated robberies.

George was subsequently charged with eleven counts, including multiple counts of robbery, confinement, and theft, along with a single count of conspiracy. The seventeen-year-old George was waived to adult court for prosecution, and the jury found him guilty on all counts. However, the court entered judgment on Count II, robbery resulting in the bodily injury of Alan Madary, a Class B felony, and on Count IV, robbery resulting in bodily injury of Jennifer Corwin, a Class B felony. The trial court subsequently sentenced George to twenty years for robbery of Madary and ten years for robbery of Corwin, with the sentences to run consecutively. George now appeals.

DISCUSSION AND DECISION

George contends the convictions for the taking Madary's cell phone must be vacated under the continuing crime doctrine. He points out that the cell phone was taken

to facilitate the defendants' escape after the money was taken. The State argues that the issue has been waived and that the doctrine does not apply because the robbery was completed before the phone was taken.

In *Buchanan v. State*, 913 N.E.2d 712, 720 (Ind. Ct. App. 2009), *trans. denied*, (quoting *Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005), *trans. denied*), we stated that the continuing crime doctrine “essentially provides that actions that are sufficient in themselves to constitute separate criminal offenses may be compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” We further stated that the doctrine “does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, the doctrine defines those instances where a defendant’s conduct amounts only to a single chargeable crime. In doing so, the . . . doctrine prevents the State from charging a defendant twice for the same continuous offense.” *Id.*

In *Buchanan*, the defendant, as a means of distracting Indiana police officers, used a pay phone in Kentucky to call in false bomb threats to Indiana’s Switzerland County High School and a local elementary school. The defendant then returned to Indiana to rob an Indiana bank, where he brandished a twelve-gauge shotgun and ordered three bank employees to put money in a duffel bag. The State subsequently arrested the defendant and charged him with Class B felony robbery, three counts of Class B felony criminal confinement, three counts of Class C felony intimidation, three counts of Class D felony false reporting, and Class D felony theft. *Id.* at 716. Buchanan argued that his

intimidation and false reporting convictions must be vacated under the continuing crime doctrine.

We noted that Buchanan phoned in the false bomb threats “as a diversionary tactic to facilitate his robbery of the bank, during which he used his shotgun to intimidate the bank’s employees into giving him the money in the vault.” We then held that that the crimes “were so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Id.* at 720-21 (quoting *Riehle*). We held that Buchanan’s false reporting and intimidation convictions should be vacated.

In the present case, the record indicates that George and Evans entered the Dominos Pizza store to take the business’s money. Contrary to the State’s claim, the robbery did not conclude at the point that the money was stolen—George and Evans still had to make their escape. In order to facilitate this escape, they ripped phones out of the wall and took Madary’s phone. The taking of Madary’s phone, “in terms of time, place, singleness of purpose, and continuity of action,” constituted a portion of the single transaction of robbing the Dominos Pizza Store. Accordingly, the robbery conviction involving Madary must be vacated.

The State argues that George waived this issue because “under the continuing crime doctrine, a defendant may not be *charged* twice for the same continuous offense.” Appellee’s Brief at 12. (Emphasis in brief). Thus, the State concludes that any challenge under the doctrine should have come in the form of a motion to dismiss.

We disagree. In both *Buchanan* and the case cited by the State, *Boyd v. State*, 766 N.E.2d 396 (Ind. Ct. App. 1998), the challenges were to convictions, not charges. There is no waiver here.

Based upon the circumstances of this case, we reverse and remand to the trial court with instructions that the conviction on Count II be vacated.

DARDEN, J., and MAY, J., concur.