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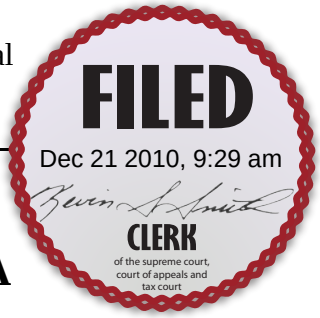


# IN THE COURT OF APPEALS OF INDIANA

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| ARENZO RICHMOND, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-1004-CR-449 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0902-FB-22381

**December 21, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

While armed with a weapon, Arenzo Richmond entered a computer store, confined the three people working there, and stole several laptops. He also took a cell phone and cash from the store owner and took a wallet from one of the employees, but gave it back when he realized that it did not contain any money. As a result, Richmond was charged with robbery, attempted robbery, and three counts of confinement. Richmond's first two trials ended in mistrials. After his third trial, Richmond was convicted on all counts and was sentenced to an aggregate term of twelve years with two suspended.

On appeal, Richmond argues that his convictions of confinement, robbery, and attempted robbery constitute double jeopardy; however, because the confinements extended beyond the time necessary to complete the robbery and attempted robbery, the convictions are proper. Next, Richmond argues that there was insufficient evidence to support one of the confinement convictions because the victim did not testify; however, we conclude that other testimony supports a reasonable inference that that victim did not consent to the confinement. Richmond also argues that he was denied a speedy trial. His third trial commenced within a year of the date that the charges were filed, and Indiana Criminal Rule 4(C) therefore was not violated; nor has he persuaded us that a Marion County rule concerning case disposition guidelines was violated. Finally, Richmond argues that the trial court abused its discretion by finding improper aggravating factors. While we agree that the trial court improperly considered the victims' fear as an aggravating factor, we conclude that the trial court would have imposed the same sentence even without this factor; therefore, we affirm his

convictions and sentence. However, Richmond correctly notes that there is an error in the abstract of judgment; therefore, we remand for the trial court to amend the abstract of judgment.

## Facts and Procedural History

On February 2, 2009, Richmond and Stanley Chapman entered an Indianapolis store called Computer Overdrive. Richmond was wearing a ski mask and wielding a handgun. Richmond ordered Mark Kilgo, the store owner, and two employees, Dustin Gibbs and Ryan Burtch,[1] to go to the back of the store and get on the ground. They all complied, and Burtch began to pray out loud. If any of them hesitated to follow orders or looked up at the robbers, Richmond would say, "Are you trying to get shot?" Tr. at 54. Richmond took Gibbs's wallet, but gave it back to him when he realized that there was no money in it. Richmond took about $400 from Kilgo's wallet, which included at least two $100 bills. He also took about $60 from the register.

Kilgo, Gibbs, and Burtch realized that the robbers had gone when they heard the door chimes. Kilgo hit the alarm button to call the police. Kilgo and Gibbs went to the door and saw Richmond getting into a black SUV. They discovered that the robbers had taken several laptops and Kilgo's cell phone. Kilgo's phone had a GPS locator, so he began tracking the location of the phone online.

Officer Justin Turner responded to the alarm, and he broadcast a description of the robbers and the location of the cell phone, the 2900 block of East Riverside Drive. Officer

[1] His name is spelled "Birch" in the transcript; however, court filings spell his name "Burtch."

Kevin Neathery located a black SUV in the 2700 block of East Riverside Drive and conducted a traffic stop. Richmond was in the driver's seat and Chapman was in the passenger seat.

Three officers transported Kilgo, Gibbs, and Burtch to the scene of the stop. Kilgo and Gibbs recognized the SUV. None of them could positively identify Richmond or Chapman, but Gibbs and Kilgo thought that they had the same build as the robbers, and they recognized Richmond's boots. After Kilgo learned Richmond's name, he remembered that Richmond had been a customer of Computer Overdrive on several occasions.

Richmond gave John Maloney, the detective assigned to the case, permission to search the vehicle. Inside, he found two laptops with stickers that said "Computer Overdrive." *Id.* at 35. Kilgo's cell phone was in the glove box. Chapman had $190 in his possession, and Richmond had $170; each man had a $100 bill.

Richmond and Chapman were charged with the robbery of Kilgo, the attempted robbery of Gibbs, and with one count of confinement for each of the three victims; all counts were charged as class B felonies because of the use of a deadly weapon. Richmond had two trials that resulted in mistrials, and he was tried a third time on March 8 and 9, 2010. Chapman entered a plea agreement with the State and testified against Richmond. Chapman admitted that he and Richmond committed the robbery at Computer Overdrive, taking laptops, money, and a cell phone. He testified that following the robbery, they left in a black SUV and took Chapman's share of the stolen items to his house. Chapman, who was seventeen at the time of the offense, lived with his mother, who gave the police permission to

search his house. The police recovered two laptops with Computer Overdrive stickers on them. Kilgo and Gibbs also testified against Richmond, but Burtch did not testify at the third trial.

The jury found Richmond guilty as charged. The trial court entered judgment on five class B felonies. At sentencing on March 31, 2010, the trial court found as a mitigating circumstance that Richmond had no criminal record. As aggravating circumstances, the court found that Richmond had been the "ringleader" of the offenses and that he had put his victims in fear. *Id*. at 261. The trial court sentenced Richmond to twelve years, with two suspended, on the robbery and attempted robbery convictions. The court sentenced Richmond to six years for each confinement conviction. All sentences were to be served concurrently. On April 1, 2010, the trial court modified Richmond's convictions and sentences for confinement, entering judgment as class D felonies and reducing the sentences to three years each. Richmond now appeals.

## Discussion and Decision

### *I. Double Jeopardy*

Richmond argues that, pursuant to the continuing crime doctrine, he may not be convicted of confinement and robbery/attempted robbery.[2]

> The continuing crime doctrine essentially provides that 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.… [T]he continuous crime doctrine

[2] The State contends that Richmond has waived this issue because he did not file a motion to dismiss the charging information. We rejected this argument in *Sanders v. State*, 914 N.E.2d 792, 794 (Ind. Ct. App. 2009), *trans. denied*. The State did not mention *Sanders* in its brief or address any of the reasons why *Sanders* declined to find waiver; therefore, we decline to part ways with *Sanders*.

> 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 continuous crime doctrine prevents the State from charging a defendant twice for the same continuous offense.

*Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005) (citations omitted), *trans. denied*.

Richmond compares his case to *Buchanan v. State*, 913 N.E.2d 712 (Ind. Ct. App. 2009), *trans. denied*. Buchanan used a pay phone to call in false bomb threats to two schools to create a diversion while he robbed a bank. Buchanan told the bank employees that he knew where their families lived and that if they told anyone, he would hurt them. Buchanan was convicted of robbery, three counts of confinement, three counts of intimidation, and two counts of false reporting.[3] On appeal, Buchanan argued that his convictions of false reporting and intimidation must be vacated pursuant to the continuing crime doctrine. Noting that the false bomb threats and his intimidation of the bank employees were part of his scheme to rob the bank, we agreed that those crimes were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction" and vacated the convictions of false reporting and intimidation. *Id*. at 720-21.

We do not agree that *Buchanan* controls. First, in *Buchanan*, we noted that the State had conceded at the sentencing hearing that the false reporting and intimidation convictions must be vacated. Second, Buchanan did not confine the bank employees any longer than it took him to rob the bank.

[3] He was also convicted of theft, but we reversed that conviction because it was a lesser included offense of robbery. *Buchanan*, 913 N.E.2d at 720.

By contrast, Richmond confined Gibbs and Burtch while he robbed Kilgo, and he confined Kilgo and Burtch while he made a separate attempt to rob Gibbs. Therefore, Richmond's case is more similar to *Austin v. State*, 603 N.E.2d 169 (Ind. Ct. App. 1992), *trans. denied*. Austin entered an apartment where seven people were gathered, told all of them to remain still, and represented that he had a gun. Austin then approached each person individually and demanded money. Austin was convicted of five counts of robbery, two counts of attempted robbery, and seven counts of confinement. We rejected Austin's argument that the confinement convictions constituted double jeopardy, because it is well established that any confinement of the victim beyond that necessary to effectuate the robbery is a separate violation. *Id*. at 174.

> To hold that the confinement of the others while one is being robbed is inherent in the force used to effectuate the robbery smacks in the face of good public policy and potentially ignores the liberties of the others affected by the robbery. If a robber approaches a group of people, but only robs one while instructing the others not to move, he has confined the others in addition to robbing the one.

*Id*.

Richmond's confinement of each victim extended beyond what was necessary to effectuate the robbery and attempted robbery. *See id*. That being the case, we are not persuaded that the offenses were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction."

### *II. Sufficiency of the Evidence*

Richmond argues that there is insufficient evidence that he confined Burtch because Burtch did not testify. When reviewing a challenge to the sufficiency of the evidence, we

neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). Rather, we consider only the evidence most favorable to the verdict and the reasonable inferences supporting it. *Id*. "We affirm if there is substantial evidence of probative value from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005), *trans. denied*, *cert. denied*. To convict Richmond of confinement, the State was required to prove beyond a reasonable doubt that he confined Burtch without his consent. Ind. Code § 35-42-3-3.

The evidence favorable to the verdict was that Richmond entered the store wielding a gun and ordered Burtch and the others to get down on the floor. If one of them hesitated to obey and order or looked up at the robbers, Richmond would say, "Are you trying to get shot?" Tr. at 54. Gibbs testified that Burtch knelt down on the floor and started praying out loud. This evidence reasonably supports an inference that Burtch was afraid and did not consent to the confinement. Therefore, we affirm Richmond's conviction for confining Burtch.

### *III. Speedy Trial*

The Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution guarantee the right to a speedy trial. *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). The provisions of Indiana Criminal Rule 4 help implement this right by establishing time deadlines by which trials must be held. *Id*. Criminal Rule 4(C) provides in relevant part:

> 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 ….

Thus, the rule places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons. *Ritchison v. State*, 708 N.E.2d 604, 606 (Ind. Ct. App. 1999), *trans. denied*.

By Richmond's own calculation, the State met that burden. The charges were filed on February 4, 2009, and his third trial commenced on March 8, 2010. The time between those dates is 397 days. Richmond concedes that ninety-one days are attributable to his own motions for continuances. Appellant's Br. at 20. Thus, the total delay not attributable to Richmond is 306 days, which is less than a year.[4]

Richmond also invokes Marion County Superior Court Criminal Rule 114, which provides that class B felonies shall be tried, pled, or dismissed within 180 days of the initial hearing unless good cause is shown. The initial hearing was on February 4, 2009, the same day that the charges were filed. Richmond appears to concede that his continuances, which resulted in a delay of ninety-one days, would also extend the 180-day period. Thus, the 180-day period was exceeded by thirty-five days.[5] Richmond has not persuaded us that this delay was not for good cause, given that three trials were needed to bring this case to a conclusion.

[4] Richmond asserts that the time period was 399 days, for a total delay of 308 days, which is still less than a year.

[5] 306 – 180 – 91 = 35

### *IV. Sentence*

Richmond frames his final issue as whether his sentence was inappropriate, and he mentions Indiana Appellate Rule 7(B); however, he does not apply that standard to the facts of his case. Rather, the thrust of his argument appears to be that the trial court abused its discretion by finding improper aggravating factors. "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A sentence "within the statutory range ... is subject to review only for abuse of discretion." *Id*. An abuse of discretion occurs if the decision is clearly against the logic and effects of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. The trial court may abuse its discretion by finding aggravating factors that are not supported by the record or that are improper as a matter of law. *Id*. at 490-91.

The trial court stated the following in regard to aggravating factors:

> The Court finds that Mr. Richmond was basically the leader and the ringleader in this robbery of this store. He is the one who went in with a mask, since he was known by the owner of the store, and held the gun to the heads of the employees and the owner of the store, and threatened to kill them when they did not comply [with] his orders to keep their heads down and lie on the floor. The Court further finds that the impact on both the owner and the young people who were starting work in the store that day, the fear that his actions caused and the resulting impact on all three of these victims, is an aggravator that is considered by the Court.

Tr. at 261.

Richmond argues that the trial court should not have considered the fact that he used a gun and placed his victims in fear because those are elements of class B felony robbery. *See* Ind. Code § 35-42-5-1 (defining robbery). Generally, a trial court may not use an element of a crime as an aggravating factor; however, the court may find that the particularized circumstances of the crime were aggravating. *Gellenbeck v. State*, 918 N.E.2d 706, 712 (Ind. Ct. App. 2009).

The trial court did not find Richmond's use of a gun as a separate aggravator; the court stated that it believed Richmond was the "ringleader" because, among other things, he was the only robber wielding a gun. Tr. at 261. We see no problem with treating Richmond's leading role in the robbery as an aggravating factor. However, we must agree with Richmond that the trial court abused its discretion by treating the victims' fear as an aggravating factor. The trial court did not state that it believed that the victims experienced fear that was beyond what victims of robbery and confinement would ordinarily experience, and the record does not reflect that they did.

If the trial court abuses its discretion by finding an improper aggravating factor, we will remand only if we cannot say with confidence that the trial court would have impose that same sentence had it considered only proper sentencing factors. *Anglemyer*, 868 N.E.2d at 491. The trial court imposed an aggregate sentence of twelve years with two suspended. His total executed sentence is equivalent to the advisory sentence for a single class B felony. *See* Ind. Code § 35-50-2-5 (advisory sentence is ten years). Given the fact that Richmond was the "ringleader" of the robbery and committed his offenses against multiple victims, we can

say with confidence that the trial court would not have imposed a lesser sentence had it not considered the victims' fear. Therefore, we affirm his sentence.

As a final matter, Richmond notes, and the State agrees, that the abstract of judgment does not reflect that the trial court modified his confinement convictions from class B felonies to class D felonies, with a sentence of three years each instead of six. Therefore, we remand for the trial court to amend the abstract of judgment.

Affirmed and remanded.

FRIEDLANDER, J., concurs.

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

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| STATE OF INDIANA, | ) | |
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| Appellee-Plaintiff. | ) | |

**BARNES, Judge, concurring in part and dissenting in part**

I concur with my colleagues in affirming Richmond's convictions for robbery, armed robbery, and confinement with respect to the victim Burtch, and in affirming Richmond's aggregate sentence. I part company with them, though, as to the confinement convictions with respect to the victims Kilgo and Gibbs.

I respectfully disagree that the facts here lend themselves to separate confinement convictions as to Kilgo and Gibbs, whom Richmond also robbed or attempted to rob. Our supreme court, as well as this court, frequently have declined to allow confinement

convictions in circumstances such as this, where the alleged confinement facilitated a robbery or other underlying offense, and nothing more. It is clear that a defendant cannot be convicted of both confinement and robbery where the confinement was coextensive with the behavior or harm necessary to establish an element of a robbery conviction. Wethington v. State, 560 N.E.2d 496, 508 (Ind. 1990). See also Polk v. State, 783 N.E.2d 1253, 1259 (Ind. Ct. App. 2003) (holding that double jeopardy tenets prohibited convictions for both robbery and confinement where the evidence revealed only one continuous confrontation between the victim and defendant). Additionally, in order for a single incident of confinement to result in two confinement convictions, it must be possible to divide the confinement into two separate parts. See Bunch v. State, No. 49A04-1002-CR-120, slip op. at 11 (Ind. Ct. App. Nov. 17, 2010) (citing Boyd v. State, 766 N.E.2d 396, 400 (Ind. Ct. App. 2002)).

It is true that "where the confinement of a victim is greater than that which is inherently necessary to rob them, the confinement, while part of the robbery, is also a separate criminal transgression." Hopkins v. State, 759 N.E.2d 633, 639 (Ind. 2001). The Wethington court also limited its holding to cases:

> where criminal confinement is charged along with another crime, the commission of which inherently involves a restraint on the victim's liberty, and where the language of the charging instruments makes no distinction between the factual basis for the confinement charge and the facts necessary to the proof of an element of the other crime.

Wethington, 560 N.E.2d at 508. Here, the charging information alleged that the only act of confinement was ordering Gibbs and Kilgo to lie on the floor. In closing argument, the prosecutor stated, with respect to the confinement, "They made them all lie down in the back

of the store in the service area while they went about doing their robbery." Tr. p. 217. The act of ordering Gibbs and Kilgo to lie on the floor was precisely how Richmond accomplished the robbery and attempted robbery, and the State made no attempt to delineate a separate act of confinement. There was but one continuous period of confinement here, and it was entirely contemporaneous with the robbery and attempted robbery.

In holding double jeopardy was not violated, the majority cites Austin v. State, 603 N.E.2d 169 (Ind. Ct. App. 1992), which says in part, "If a robber approaches a group of people, but only robs one while instructing the others not to move, he has confined the others in addition to robbing the one." I have no difficulty in affirming a separate confinement conviction with respect to Burtch, whom Richmond did not attempt to rob. It also is clear that there can be multiple convictions for confinement where multiple victims are confined. Burnett v. State, 736 N.E.2d 259, 263 (Ind. 2000) (overruled on other grounds by Ludy v. State, 784 N.E.2d 459, 462 n.2 (Ind. 2003)). I do not believe, however, that when Richmond took Gibbs's wallet while Kilgo was lying on the ground as ordered, that the confinement of Kilgo was more than what was necessary to rob Gibbs, and vice versa. In other words, for Richmond to accomplish his robbery of Kilgo and attempted robbery of Gibbs, it was necessary for Kilgo and Gibbs to both remain confined for the entire, continuous period of time.

It is true that we do not have a bright line rule in these situations, and that is understandable, because each case is factually unique. I can envision scenarios where the facts of a case and the conduct exhibited by a defendant would allow both a confinement

conviction and a robbery victim with respect to a single victim. I do not believe that this is such a case. I vote to vacate Richmond's convictions for confining Gibbs and Kilgo.