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IN THE
COURT OF APPEALS OF INDIANA

JASON D. PETTY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 48A05-0601-CR-9

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0502-FB-51

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jason D. Petty appeals the sentences he received after pleading guilty to armed robbery, two counts of intimidation, and resisting law enforcement. Petty argues the court should have ordered his sentences served concurrently, it improperly considered aggravators and failed to find mitigators, and his sentence is inappropriate. The trial court improperly considered one aggravator and should have found Petty's guilty plea a mitigating factor; nevertheless, the trial court could properly impose the sentence it did. Further, Petty's sentence was appropriate. We do not address Petty's assertion consecutive sentences were error, as he did not support it with cogent argument and legal authority. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

On February 8, 2005, C.C. was working at a Village Pantry in Madison County. Petty came into the store at approximately 5:15 a.m. He approached the front counter, pulled out a knife, and told C.C. he would slit her throat if she did not give him the money from the register. He also told C.C. he would hurt her if she pushed the alarm button. C.C. yelled for her manager, S.C, who was in the bathroom, and pushed the alarm button while Petty was not looking. When S.C. came out, Petty told her he was there to rob her and that all he wanted was the money.

S.C. removed the money from the register, counted it out and put it in a bag. Petty then demanded the change, and S.C. complied. Petty again threatened to kill both S.C. and C.C. Petty demanded a carton of Kool cigarettes and ordered C.C. to get them for him. At this point the police arrived.

The officers saw Petty leaning over the front counter. C.C. and S.C. were directly in front of him. One officer pointed his weapon at Petty, grabbed the back of his coat, and told him to get on the floor. Petty turned around and grabbed the muzzle of the officer's gun. The officer ejected the magazine from the weapon and pulled it from Petty's grasp. After a brief struggle, the officers handcuffed Petty.

Petty was charged with Count I, armed robbery, a Class B felony; Count II, intimidation of C.C., a Class C felony; Count III, intimidation of S.C., a Class C felony, and Count IV, resisting law enforcement, a Class A misdemeanor. He pled guilty and was sentenced to 15 years on Count I, 4 years on Count II, 4 years on Count III, and 1 year on Count IV. The sentences for Counts I, III and IV were ordered served consecutively, with Count II to run concurrently.

DISCUSSION AND DECISION

1. Consecutive Sentences

Petty argues "the continuing crime doctrine requires that the intimidation sentences be made concurrent with the robbery sentence." (Br. at 6.) He cites *Riehle v. State*, 823 N.E.2d 287, 296 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 846 (Ind. 2005), which states:

> 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. *Nunn v. State*, 695 N.E.2d 124, 125 (Ind. Ct. App. 1998). Although Riehle frames this issue on appeal as a violation of Indiana double jeopardy principles, we note that the continuous crime 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. *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*.

The determination whether to impose consecutive or concurrent sentences is entirely at the discretion of the trial judge. *Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006). Petty offers no argument or legal authority to support his apparent premise that the trial court's discretion to impose consecutive sentences is limited by the continuing crime doctrine, nor does he argue on appeal the intimidation and the robbery were the same continuous offense. As Petty has failed to make a cogent argument on this issue, he has waived the allegation of error. *See* Ind. Appellate Rule 46(A)(8). .

2. Aggravating and Mitigating Circumstances

Petty argues the trial court found improper aggravating circumstances and failed to consider mitigating circumstances. The trial court found as aggravating circumstances: Petty had a prior conviction of burglary as a Class C felony;[1] he was on probation when he committed the armed robbery; he had been released from prison just eight months before; and he threatened the store employees. The trial court found no mitigating circumstances.

One aggravator, that Petty threatened the store employees, was improper as the threats were the basis of the intimidation counts. *See Townsend v. State*, 498 N.E.2d

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[1] Petty argues the trial court improperly considered his felony conviction of burglary an aggravating circumstance, as "burglary is a purely property offense" and "does not involve any traits of violence." (Br. of Appellant at 11.). We disagree. Burglary, whether of a residence or a business, involves elements of breaking and entering. It also requires intent to commit a felony in the building that is entered. Ind. Code § 35-43-2-1. Petty does not challenge the other two aggravating circumstances.

1198, 1201 (Ind. 1986) (fact that comprises a material element of a crime may not also be an aggravating circumstance used to support an enhanced sentence).

A guilty plea is not automatically a significant mitigating factor. *Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002) (court did not abuse its discretion in according only minimal weight to a guilty plea). However, Petty pled guilty to all of the charged offenses, with no agreement as to sentencing. This saved the State the time and cost of a trial. The trial court should have found Petty's guilty plea a mitigating factor. *See Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004) (guilty plea may be accorded significant mitigating weight because it saves judicial resources and spares the victim a lengthy trial).

Petty also argues his remorse should have been found a mitigating factor. Petty did apologize to C.C. and S.C.; however, he also told them and the court he was under the influence of drugs and really did not know what he did. The trial court could have properly determined Petty did not show true remorse, and thus it was not a mitigating circumstance. *See Price v. State*, 765 N.E.2d 1245, 1253 (Ind. 2002).

Three valid aggravating circumstances and one valid mitigating circumstance remain. We cannot say with certainty the trial court would have given Petty a different sentence had it considered only the proper aggravators and mitigators.

3. Inappropriate Sentence

Petty argues "[f]ifteen years for armed robbery is inappropriate in light of the nature of the crime and the defendant's character." [2] (Br. of Appellant at 13.) Ind. Appellate Rule 7(B) permits us to revise a sentence authorized by statute if the sentence is "inappropriate in light of the nature of the offense and the character of the offender." *Buggs v. State*, 844 N.E.2d 195, 204 (Ind. Ct. App. 2006).

a. Nature of the Crime

Petty entered a convenience store brandishing a knife and made multiple threats against the two clerks. Both clerks testified at the sentencing hearing they were afraid and they suffer from after-effects of the robbery.

b. Character of the Offender

Petty's pre-sentence investigation reveals prior convictions of Class C felony burglary, battery,[3] two counts of theft as Class D felonies, and a number of juvenile offenses. He was on probation when he committed the offenses in the case before us. Petty had been through at least one drug and alcohol treatment program, but he admitted to using "crack, cocaine, xanax, hydrocodone, oxycodone and alcohol" (App. at 14) at the time of the robbery.

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[2] "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5.

[3] He violated his probation in the battery case.

Nothing about Petty's character or his offense suggests his enhanced sentence was inappropriate.

We affirm.

BAILEY, J., and RILEY, J., concur.