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IN THE COURT OF APPEALS OF INDIANA

JAMES R. SHELTON, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	No. 49A05-0702-CR-75

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Priscilla Fossum, Judge Pro Tempore
Cause No. 49G01-0604-FB-69353

November 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

James R. Shelton appeals his conviction on two counts of robbery,[1] each as a Class B felony. On appeal, Shelton raises two issues, which we restate as:

I. Whether he was entitled to separate trials on two counts of robbery that occurred at the same location and against the same victim; and

II. Whether there was sufficient evidence to support his Count II robbery conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 7, 2006, Shelton entered the West Michigan Street Village Pantry located in Indianapolis. He grabbed two cheeseburgers and headed to the counter where Deelisa Anderson was working the register. After Anderson totaled the costs, Shelton went to his vehicle to get money. Upon his return, Shelton displayed a handgun in his waistband and demanded several times that Anderson open the register. A car then pulled up in front of the Village Pantry, and Shelton replied "F--- it." *Tr.* at 32. Shelton grabbed the cheeseburgers and left the store without paying.

Five days later, Shelton returned to the same Village Pantry, this time with a shotgun. Shelton pumped the shotgun, pointed it at Anderson, and demanded that Anderson open the register. After Anderson complied, Shelton took the money and fled. Anderson later identified Shelton from a photographic array as the man who had robbed her twice.

The State charged Shelton with four counts of Class B felony robbery. Counts I and III occurred on March 1, 2006 and March 8, 2006, respectively, and involved

[1] *See* IC 35-42-4-1.

different victims at different locations. Count II alleged Shelton committed armed robbery at the Village Pantry on March 7, 2006 and Count IV alleged Shelton committed armed robbery on March 12, 2006 at the same Village Pantry against the same victim.

On the day of trial, the State dismissed Count I because it could not locate the victim. Shelton then moved to sever the remaining charges. After hearing argument, the trial court severed Count III and tried Count II and IV together. A jury found Shelton guilty of the crimes committed at the Village Pantry, and after a plea agreement, Shelton later pled guilty to Count III. Shelton now appeals.

DISCUSSION AND DECISION

I. Severance

Shelton argues that he was entitled to have Count II and Count IV severed for trial as a matter of right. Further, he claims the trial court abused its discretion in denying his motion to try the counts separately because the charges were not part of a single scheme or plan.

Two or more offenses may be joined if: (1) they are of the same or similar character; *and* (2) they are based on the same conduct or series of acts connected together or constituting parts of a single scheme or plan. IC 35-34-1-9(a). If two offenses are joined solely on the basis that they are of the same or similar character, the defendant is entitled to a severance as a matter of right, and the trial court is without discretion to deny such a motion. IC 35-34-1-11(a); *see also Craig v. State*, 730 N.E.2d 1262, 1265 (Ind. 2000); *Harvey v. State*, 719 N.E.2d 406, 409 (Ind. Ct. App. 1999). If, however, two offenses also share a single scheme or plan, e.g., *modus operandi*, the trial court has

discretion to sever the counts where a severance will promote a fair determination of the defendant's case. IC 35-34-1-11(a); *Harvey*, 719 N.E.2d at 409 (citing *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997)). In exercising its discretion, the trial court should consider the following three factors: "(1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense." IC 35-34-1-11(a).

The State cites *Harvey* as justification for the trial court's denial of Shelton's motion to separate. In *Harvey*, the defendant was charged with two counts of robbery occurring in early November 1996. 719 N.E.2d at 408. The two robberies occurred at the same time of day, in the same part of town, and involved two suspects, one very tall and the other fairly short. In both instances, the taller individual held the handgun and pistol-whipped the attendant after taking the money. While we recognized that some of the characteristics of each crime were consistent with many robberies, we found more overlapping facts than would entitle the defendant to a severance as a matter of right. *Id.* at 409; *see also Waldon v. State*, 829 N.E.2d 168, 174-75 (Ind. Ct. App. 2005), *trans. denied*.

Likewise, here, we find the crimes are of the same character and are consistent with a single scheme – to rob the West Michigan Street Village Pantry. On March 7 and 12, 2006, Shelton entered the same Village Pantry store, encountered the same victim and eyewitness, Anderson, displayed a firearm, and demanded money from the register. While there are distinguishing facts between the crimes, i.e., first a handgun and second a

shotgun, the crimes were committed in close proximity of time, at the same store, and against the same identifying victim. Therefore, Shelton was not entitled to a severance as a matter of right.

We must now determine whether the trial court's denial of a severance was an abuse of discretion. A trial court abuses its discretion when the denial of a severance interferes with a fair determination of the charges against the defendant. *Brown v. State*, 650 N.E.2d 304, 305 (Ind. 1995). As in *Harvey*, Shelton failed to present evidence that the number of offenses or the complexity of the evidence subjected him to prejudice. 719 N.E.2d at 408. Instead, the two offenses and the evidence to support their proof are related. Thus, the trial court did not abuse its discretion.[2]

II. Sufficiency of the Evidence

Shelton next claims that there was insufficient evidence to prove he committed armed robbery when he took the cheeseburgers from the Village Pantry. In reviewing the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witnesses. *Sutherlin v. State*, 784 N.E.2d 971, 974 (Ind. Ct. App. 2003). "Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.*

To convict Shelton of robbery as a Class B felony, the State was required to prove beyond a reasonable doubt that Shelton knowingly took property from another by using

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[2] Shelton argues that the trial court's finding during the sentencing hearing that the crimes were separate and distinct was further support that he was entitled to a severance as a matter of right. *Appellant's Br.* at 6 n.1. The trial court's recognition was for consecutive sentencing purposes and was not related to whether separate trials should have been granted.

or threatening the use of force, while armed with a deadly weapon. *See* IC 35-42-5-1; *see also Appellant's App.* at 25. Anderson positively identified Shelton as the individual who demanded money from the register while displaying a handgun in his waistband and took two cheeseburgers by force. There was sufficient evidence to convict Shelton of robbery as a Class B felony. Based on our standard of review, we cannot accept Shelton's invitation to reweigh the evidence against him.

Affirmed.

ROBB, J., and BARNES, J., concur.