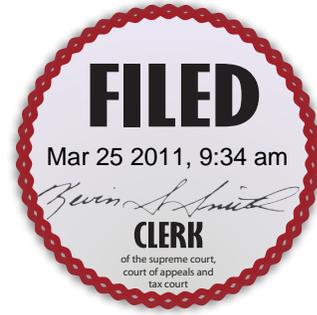


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BRIAN CALAWAY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1008-CR-953

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable James B. Osborn, Judge
The Honorable Jennifer Jones, Judge Pro-Tempore
Cause No. 49F15-0911-FD-95153

March 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brian Calaway appeals his convictions for Class D felony theft and Class A misdemeanor battery. We affirm.

Issue

The restated issue before us is whether there is sufficient evidence to support Calaway's convictions.

Facts

The evidence most favorable to the convictions is that on November 15, 2009, Calaway was at the Circle City Flea Market in Indianapolis. The flea market has approximately seventy-five separate booths. There is no centralized cashier in the flea market, and payment for items is made at each individual booth. One of the vendors in the flea market was Sulan Hu, who sold shoes.

Calaway went to Hu's booth and inquired about a pair of shoes, and Hu handed him the shoebox. After Hu had turned her attention to other customers, she noticed that Calaway had left her booth and that the shoes were missing from the shoebox. Hu saw Calaway in the aisle, and she began running after him. James Richardson, the flea market general manager, saw Calaway running towards him and in the direction of the flea market exit. Richardson stood in front of Calaway and stopped him. Calaway had placed the shoes underneath a jacket he was wearing, and they fell to the floor as Richardson and David Coombes, Richardson's assistant, attempted to apprehend Calaway. Calaway

claimed that he only was going to show the shoes to a friend and ask the friend to pay for them.

Richardson insisted that Calaway accompany him to the main office, telling Calaway, “You are not going to steal in my house and get away with it.” Tr. p. 19. After getting to the office, Calaway said that he was not going to stay there. Before the police could be called, Calaway lunged at Richardson and struck Richardson on the arm with a cologne bottle with a hard cap, which caused Richardson to bleed. After Calaway attacked Richardson, Richardson “body-slammed” Calaway onto a desk and managed to subdue him until the police arrived. Id. at 29.

The State charged Calaway with Class D felony theft and Class A misdemeanor battery. The trial court held a bench trial on June 17, 2010, and found Calaway guilty as charged. He now appeals.

Analysis

Calaway challenges the sufficiency of the evidence for both of his convictions. When reviewing the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and respect the fact-finder’s exclusive province to weigh conflicting evidence. Jackson v. State, 925 N.E.2d 369, 375 (Ind. 2010). We consider only the probative evidence and reasonable inferences therefrom that support the verdict. Id. We will affirm if the probative evidence and reasonable inferences from that evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

As a general matter, Calaway points out that the testimony of Hu, Richardson, and Coombes was not always entirely consistent. To the extent there were inconsistencies, they were on relatively irrelevant points, such as whether Hu removed the shoes from Calaway's person or whether they fell to the floor first, or whether it was Richardson or Coombes who was beginning to call police when Calaway attacked Richardson. Additionally, it was the job of the trial court, acting here as fact-finder, to sort through any inconsistencies and to decide which version of events likely was accurate, or whether those inconsistencies called the credibility of the witnesses into question. See Soward v. State, 716 N.E.2d 423, 425 (Ind. 1999).

Turning now to the theft conviction, Calaway contends that there is insufficient evidence he intended to deprive Hu of the value or use of the shoes as required to support that conviction. See Ind. Code § 35-43-4-2(a). Rather, he argues, as he did before the trial court, that he merely was taking the shoes from Hu's booth to show to a friend. To accept Calaway's argument, however, would be tantamount to reweighing the evidence, which we cannot do.

The evidence most favorable to the theft conviction is that Calaway did conceal the shoes underneath his jacket as he ran toward the exit for the flea market, while Hu ran after him. Although Calaway had not yet passed the exit, he had left Hu's booth without paying for the shoes, and his act of concealing them as he headed toward the exit supports a reasonable inference that he intended to deprive Hu of the value or use of the shoes. See Johnson v. State, 413 N.E.2d 335, 336 (Ind. Ct. App. 1980) (holding that

evidence that defendant had stuffed clothing into her tote bag was sufficient to support theft conviction, even if defendant had been forced by store clerk to remove items from tote bag before leaving the store). Additionally, Calaway's act of running towards the exit with the concealed shoes is inconsistent with his claim that he merely wanted to show the shoes to a friend, and instead may be considered circumstantial evidence of his guilt. See Miller v. State, 544 N.E.2d 141, 143 (Ind. 1989). There is sufficient evidence to support Calaway's theft conviction.

With respect to the battery conviction, Calaway argues that it is impossible to determine from the evidence whether Richardson's arm was injured as a result of Calaway's actions, or as a result of Richardson "body-slam[ing]" Calaway onto a desk. Tr. at 29. We disagree. Richardson clearly testified that Calaway lunged at him and cut his arm with the cap of a cologne bottle. It is true that Richardson evidently did not notice he was bleeding until after police arrived and that the cologne bottle was not obtained by police. Nonetheless, these matters clearly were for the trial court to consider as fact-finder. It believed Richardson's testimony, and it is not our place to second-guess that determination.

Calaway also essentially contends that Richardson was partially at fault for Calaway's actions because Richardson and others acting at Richardson's direction forced Calaway into the flea market office without any of those persons being clearly identified as flea market employees. Calaway relies upon a civil case wherein this court held that if a store employee's failure to identify himself causes a person detained on suspicion of

shoplifting to resist, “thereby escalating the situation,” the merchant may possibly be liable for resulting injuries to the detainee. Wal-Mart Stores, Inc. v. Bathe, 715 N.E.2d 954, 961 (Ind. Ct. App. 1999), trans. denied. It is not clear that this case should have any relevance in the criminal context, as opposed to judging Calaway’s battery upon Richardson under self-defense principles. Nonetheless, at the time of Calaway’s assault, after Calaway had in fact been taken to the flea market office, it should have been clear that Richardson was a flea market employee. Calaway’s attack upon Richardson was not the result of a heat-of-the-moment physical altercation, but instead clearly appears to have been a calculated attempt by Calaway to escape the flea market before police arrived on the scene. There is sufficient evidence to support Calaway’s battery conviction.

Conclusion

There is sufficient evidence to support Calaway’s convictions for theft and battery.

We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.