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**IN THE
COURT OF APPEALS OF INDIANA**

MARVIN L. ERVIN,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-1002-CR-123
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 15
The Honorable James B. Osborn, Judge
Cause No. 49F15-0906-FD-57452

April 13, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Marvin Ervin (Ervin), appeals his conviction for theft, a Class D felony, Ind. Code § 35-43-4-2 and his adjudication as a habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUES

Ervin raises three issues on appeal, which we consolidate and restate as the following two issues:

- (1) Whether the trial court abused its discretion by admitting pawn shop documents under the business record exception to the hearsay rules; and
- (2) Whether the trial court abused its discretion when it refused to instruct the jury on the offense of conversion, the lesser included of theft.

FACTS AND PROCEDURAL HISTORY

On June 9, 2009, at approximately 1:50 p.m., Ervin and Cameron Crowe (Crowe) visited Crystal Jones (Jones) at Jones' apartment on East Michigan Street in Indianapolis, Indiana. Ervin brought his bicycle with him, and per building policy, Jones instructed Ervin to put the bicycle in the basement. When Ervin and Crowe left, Ervin took his bicycle with him, while Crowe carried out a red, ten-speed Huffy bicycle. That evening, shortly before 6 p.m., Ervin took the red Huffy to Cash America Pawn and sold it for fifteen dollars.

The next day, Larry Johnson (Johnson), another tenant in Jones' apartment building, reported his red, ten-speed, Huffy bicycle stolen from the building's basement. Indianapolis Metropolitan Police Officer Thomas Goodin (Officer Goodin), who worked as an off-duty

security guard at the apartment building, reviewed the video footage taken on the previous day from several cameras inside the apartment building. The video showed Ervin and Crowe visit Jones' apartment and then leave with Johnson's bicycle. After Jones identified both men, Officer Goodin filed a police report.

Indianapolis Metropolitan Police Detective Julie Busic (Detective Busic) entered Ervin's name in "Leads Online," a database containing information entered by pawn shops throughout the country. (Transcript p. 85). Through the database, Detective Busic was informed that Ervin had pawned a red Huffy bicycle at the Cash America Pawn. She contacted Detective Mary Horthy (Detective Horthy) of the pawn unit with the Indianapolis Metropolitan Police Department (IMPD), who pulled the pawn card, a card created by Cash America Pawn by duty of law that records the pawn transaction and which is kept by IMPD's pawn unit. The pawn card contained Ervin's name and identifying information, the specific characteristics of the bicycle, Ervin's thumb print, and his signature. Detective Horthy contacted Cash America Pawn to place a police hold on the bicycle and to retrieve the bill of sale created for the transaction. The bill of sale also listed Ervin's name, address, identifying information, and his thumb print as well as identifying information for the bicycle.

On June 19, 2009, the State filed an Information charging Ervin with theft, a Class D felony, I.C. § 35-43-4-2. On December 16, 2009, the State amended its charging information by alleging Ervin to be a habitual offender, I.C. § 35-50-2-8. On December 23, 2009, a jury trial was held. At trial, Ervin objected to the admission of the pawn card and the bill of sale under the business records exception of the hearsay rules on the ground that no testimony

established that the documents were made at or near the time of the event and that they were made by a person with knowledge of the transactions. The trial court overruled the objection and admitted both exhibits. At the close of the evidence and prior to instructing the jury, Ervin tendered a proposed jury instruction for theft, as a Class A misdemeanor, which was overruled by the trial court on the basis that the evidence did not support it. After deliberation, the jury found Ervin guilty as charged on the theft charge and he subsequently pled guilty to being a habitual offender. On January 11, 2010, the trial court sentenced Ervin to 910 days executed for theft, with a 545 days enhancement for the habitual offender adjudication.

Ervin now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Business Records Exception

Ervin first contends that the trial court abused its discretion when it admitted the pawn card and bill of sale into evidence pursuant to the business record exception of the hearsay rules. Specifically, Ervin argues that the State failed to establish that an individual with personal knowledge had prepared the documents near the time of the transaction and as such, the documents did not meet the requirements of the business records exception.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc.*, 834 N.E.2d 129, 133 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and

circumstances before the court. *Id.* Moreover, we will not reverse the trial court's admission of evidence absent a showing of prejudice. *Id.*

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless admitted pursuant to a recognized exception. Evid. R. 802. The business records exception to the hearsay rule, Evidence Rule 803(6), permits admission of records of regularly conducted business activity provided that certain requirements are met. The rule specifically provides:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

To admit business records pursuant to this exception, the proponent of the exhibit may authenticate it by calling a witness who has a functional understanding of the record keeping process of the business with respect to the specific entry, transaction, or declaration contained in the document. *Rolland v. State*, 851 N.E.2d 1042, 1045 (Ind. Ct. App. 2006). The witness need not have personally made or filed the record or have firsthand knowledge of the transaction represented by it in order to sponsor the exhibit. *Id.* Rather, such person need show only that the exhibit was part of certain records kept in the routine course of business and placed in the records by one who was authorized to do so and who had personal

knowledge of the transaction represented at the time of entry. *Id.* Records kept in the ordinary course of business are presumed to have been placed there by those who have a duty to so record and have personal knowledge of the transaction represented by the entry, unless there is a showing to the contrary. *Id.*

During the State's case-in-chief, the State established the foundational requirements for the admission of the pawn card and bill of sale under the business records exception through the testimony of its witness, Christopher Steadmon (Steadmon), the manager of Cash America Pawn.¹ Steadmon identified the pawn card and bill of sale as two documents generated by a Cash America Pawn customer service representative in the regular course of business at the time of the sales transaction. He clarified that prior to being able to complete these documents, each customer service representative must partake in a month-long training and a period of time shadowing another employee. Each employee executes a transaction the same way: first, the employee determines the ownership of the item offered for sale and retrieves the identifying characteristics, like serial number, make, and model. Second, Steadmon explained that the employee enters this information, together with the identifying information from the seller, into the computer at the time of sale to generate the pawn card. The employee can only take the personal identifying information from a state-issued identification card and the seller's thumb print is recorded on the pawn card. At the end of

¹ The record shows that even though the documents were admitted into evidence through Detective Horty, the foundational requirements for their admission were introduced during Steadmon's testimony.

the transaction and in accordance with the law, the pawn card is mailed within twenty-four hours to IMPD.

Next, Steadmon explained the generation of a bill of sale. In addition to the pawn card, the customer service representative creates a bill of sale contemporaneous to the transaction. This bill of sale includes the same identifying information of the seller and the item being sold as on the pawn card. The bill of sale and the pawn card are linked together by including the bill of sale's number at the bottom of the pawn card.

Through Steadmon's testimony, the State established that the pawn card and the bill of sale are kept in the routine course of Cash America Pawn's business, and the information contained in those documents was compiled contemporaneously with the information being provided by Ervin and was placed into the record by a customer service representative who had personal knowledge of the transaction and who had a duty to generate accurate information. As such, the trial court properly admitted the pawn card and bill of sale into evidence as business records.

II. *Jury Instruction*

Next, Ervin contends the trial court erred by denying his request to instruct the jury on criminal conversion, a Class A misdemeanor, as a lesser included offense of theft. In a closely-related argument, Ervin claims that the Class D felony theft violated the Proportionality Clause of the Indiana Constitution because even though it is established by the same material elements as criminal conversion, a Class A misdemeanor, it carries a higher penalty.

In reviewing a claim that the trial court refused to give a tendered instruction, we consider “(1) whether the instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given.” *Mayes v. State*, 744 N.E.2d 390, 395 (Ind. 2001). The decision to give or deny a tendered jury instruction is left to the sound discretion of the trial court. *Taylor v. State*, 629 N.E.2d 852, 855 (Ind. Ct. App. 1994). We review the trial court’s decision only for abuse of that discretion. *Id.*

Indiana appellate courts have consistently held that criminal conversion is an inherently lesser included offense of theft because conversion may be established by proof of less than all the material elements of theft. *See, e.g., Shouse v. State*, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006), *trans. denied*. Indiana Code section 35-43-4-2 states, in relevant part: “A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.” Pursuant to Indiana Code section 35-43-4-3, “[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor.” Clearly, the only element distinguishing theft from conversion is whether the defendant acted with intent to deprive a person of the value or use of that person’s property.

In earlier cases, and again very recently in *Morris v. State*, 921 N.E.2d 40 (Ind. Ct. App. 2010), *reh’g denied, trans. denied*, we have discussed the practical difference between conversion and theft:

We are unable to envision a situation in which an individual could knowingly exert unauthorized control over property of another without intending, at least implicitly, to deprive the other person of the property's value or use. Thus, *while from a strictly legalistic or semantic standpoint there is a difference in the mens rea required for the offenses*, from a practical standpoint the offenses appear to be one and the same.

Id. at 42 (quoting *Irvin v. State*, 501 N.E.2d 1139, 1142 n.3 (Ind. Ct. App. 1986)) (emphasis added). In *Morris*, we noted an evidentiary dispute as to whether Morris intended to deprive the store of the use and value of the clothing for any period of time, which justified the giving of jury instructions on both conversion and theft. *Id.* at 43. In dicta, the *Morris* court added that even if we were to view theft and conversion as one and the same crime in every circumstance, the law supports the giving of the lesser included offense instruction. *Morris*, 921 N.E.2d at 43. First, there is the rule of lenity, which requires that criminal statutes must be strictly construed against the State. *Id.* (citing *Mask v. State*, 829 N.E.2d 932, 936 (Ind. 2005)). In addition, the court noted, if the criminal conversion and theft statutes are indeed one and the same, then they violate the Proportionality Clause, which is contained in Article 1, Section 16 of the Indiana Constitution. *See also id.* at 44. Our supreme court has held that a finding of unconstitutionality pursuant to the Proportionality Clause should be reversed for “penalties so disproportionate to the nature of the offense as to amount to clear constitutional infirmity sufficient to overcome the presumption of constitutionality afforded to legislative decisions about penalties.” *Id.* (quoting *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997)). In light of these principles and mindful that *Morris*' Proportionality discussion is dicta, the issue thus becomes whether there existed a serious evidentiary dispute about the

element of intent that distinguishes the greater offense of theft from the lesser offense of conversion such that a jury could conclude that the lesser offense was committed but not the greater.

Here, Ervin's proposed instruction on conversion correctly stated the elements of the charge. Furthermore, the same evidence offered by the State to prove theft could also have proven criminal conversion. As elaborated by Ervin at trial, "the charge could easily have been charged as a conversion" and the jurors should be given the conversion instruction because they might conclude that it "could fit this case." (Tr. p. 143). Furthermore, no other instruction advised the jury of criminal conversion or gave it the option to convict Ervin of a misdemeanor. Nonetheless, the trial court denied Ervin's request to instruct the jury on conversion. We agree.

As a general rule, a defendant in a criminal case is entitled to have the jury instructed on any theory of defense which has some foundation in the evidence. *Taylor*, 629 N.E.2d at 855. This rule applies even if the evidence is weak and inconsistent. *Id.* Here, unlike in *Morris*, there was no evidentiary dispute about Ervin's intent. There was no evidence presented at trial that Ervin's use of the bicycle was temporary, that he was not exerting complete control over it when he took it to the pawn shop and sold it or that he did not intend to deprive the bicycle's owner of its use and value. As such, the giving of a jury instruction

on the lesser included offense of conversion was not warranted and the trial court acted within its discretion by refusing to give it.

CONCLUSION

Based on the foregoing, we conclude that the pawn card and bill of sale were properly admitted under the business record exception to the hearsay rules. In addition, we find that the trial court did not abuse its discretion when it refused to instruct the jury on the offense of conversion, the lesser included of theft.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.