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**IN THE
COURT OF APPEALS OF INDIANA**

BLAS OLAIS-CORRALES,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A02-0808-CR-766

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John W. Hammel, Judge
Cause No. 49F24-0802-FD-042687

April 28, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Blas Olais-Corrales (“Olais-Corrales”) was convicted in Marion Superior Court of Class D felony theft. Olais-Corrales appeals and raises the following dispositive issue: whether the trial court abused its discretion when instructing the jury regarding the uncorroborated testimony of the complaining witnesses. We reverse and remand for a new trial.

Facts and Procedural History

On February 19, 2008, Darron Coy (“Coy”), the Loss Prevention Manager (“LPO”) at a Sears department store in Indianapolis, was on the sales floor when Coy noticed Olais-Corrales select a leather coat from the sales rack and proceed down the escalators. Olais-Corrales walked past the checkout registers without paying and continued toward the store’s double entrance doors. Coy tried to apprehend Olais-Corrales, but was unable to catch Olais-Corrales within ten feet of the store’s entrance. Sears policy forbade pursuit past that point, so Coy had to let Olais-Corrales leave.

Later that day, at approximately 6:30 p.m., Coy, who was using the store’s video surveillance system, saw that Olais-Corrales returned. Coy left the video monitoring room and walked to the sales floor and watched Olais-Corrales. Coy found Olais-Corrales carrying another leather jacket and then proceed down the escalator. Coy followed Olais-Corrales toward the doors through the women’s clothing area, where Coy saw Olais-Corrales stuff the leather jacket down the front of his pants. Coy continued to watch Olais-Corrales, who then entered the men’s restroom.

After about thirty seconds had passed, Olais-Corrales emerged from the restroom and walked back to the women's clothing area. According to Coy, Olais-Corrales took seven pairs of jeans from the area's merchandise racks. Olais-Corrales proceeded to walk past the cash register and out the first of the store's double doors. Coy apprehended Olais-Corrales before he passed through the second, outer door. Coy retrieved the leather jacket from Olais-Corrales's pants, and seven pairs of jeans from Olais-Corrales's arms.

Coy took Olais-Corrales to the loss prevention office. Coy noticed "a heavy smell of alcohol" about Olais-Corrales, and that Olais-Corrales was "slurring his speech" as he tried to apologize. Tr. p. 46. The police were called and Olais-Corrales was arrested and charged with theft.

On February 19, 2008, Olais-Corrales was charged with two counts of theft, as Class D felonies. On June 10, 2008, a jury found Olais-Corrales guilty on Count II and sentenced him to two years. Olais-Corrales now appeals.

Discussion and Decision

Instruction of the jury is within the discretion of the trial court and is reviewed only for an abuse of discretion. Bayes v. State, 791 N.E.2d 263, 264 (Ind. Ct. App. 2003). This well-settled standard by which we review challenges to jury instructions affords great deference to the trial court. Id. (citing Wooden v. State, 757 N.E.2d 212, 214 (Ind. Ct. App. 2001)), trans. denied. Further, we note that any error in giving jury instructions is subject to a harmless error analysis. Id. (citing Moore v. State, 649 N.E.2d 686, 689 (Ind. Ct. App. 1995)), trans. denied.

To establish that Olais-Corrales committed a Class D felony theft, the State was required to prove that Olais-Corrales “knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use.” See Ind. Code § 35-43-4-2 (2004 & Supp. 2008).

Olais-Corrales contends that the trial court erred by giving Final Instruction No. 41, which states “A conviction may be sustained by the uncorroborated testimony of a single eyewitness.” Appellant’s App. at 81. In particular, Olais-Corrales objects to instruction because it highlights the uncorroborated testimony of loss prevention manager Coy thus adversely affecting his substantive rights.

Our Supreme Court addressed this very issue in Ludy v. State, 784 N.E.2d 459 (Ind. 2003). In that case, the court held that the jury instruction that a “conviction may be sustained by the uncorroborated testimony of a single witness” was considered erroneous. The court found that the challenged instruction was problematic because it (1) unfairly highlighted a single witness's (i.e., the alleged victim's) testimony; (2) presented an appellate standard of review that is irrelevant to a jury's function as fact-finder; and (3) possibly confused the jury by using the technical term “uncorroborated.” Id. at 461.

However, as stated in Ludy, even though the jury instruction was erroneous, the court would disregard the error if it did not affect the substantial rights of the defendant. Bayes v. State, 791 N.E.2d 263 (Ind. Ct. App. 2003). See also Ind. Appellate Rule 66(A). Additionally, “errors in the giving or refusing of instructions are harmless where a

conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.” Smith v. State, 755 N.E.2d 1150, 1152 (Ind. Ct. App. 2001).

In the present case, the jury instruction given is erroneous on its face under Ludy. Having determined that the instruction was erroneous, we now turn to whether the error affected Olais-Corrales’s substantial rights. At the trial, Coy testified that he recovered a leather jacket from Olais-Corrales’s pants, and seven pairs of jeans from Olais-Corrales’s arms. However, there were no other witnesses to corroborate his testimony. The State’s only other witness, Officer Andrew Spalding (“Officer Spalding”), arrived at the scene only after Olais-Corrales had been detained by Coy. Officer Spalding testified that he had no “first-hand knowledge” of what transpired. Tr. p. 58. Thus, we cannot say that the instructional error did not affect Olais-Corrales’s substantial rights.

Based on the foregoing, the instruction was erroneous and this erroneous instruction affected Olais-Corrales’s substantial rights. Therefore, we reverse his conviction and remand for a new trial.¹

Reversed and remanded for a new trial.

RILEY, J., and KIRSCH, J., concur.

¹ In his brief, Olais-Corrales also correctly argues that the trial court should have provided the jury with a written copy of the preliminary jury instructions. See Ind. Jury Rule 20(c) (2009). However, Olais-Corrales waived this claim of error when he failed to object during the trial. See Clay v. State, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002).