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FILED
May 20 2009, 9:23 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

TOMMY GILK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0810-CR-893
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John Boyce, Judge Pro Tempore
Cause No. 49G01-0801-FC-13431

May 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Tommy Gilk appeals his conviction and sentence for burglary, a Class C felony; conversion, a Class C felony; theft, a Class D felony; and two counts of criminal mischief, one as a Class A misdemeanor and the other as a Class B misdemeanor. On appeal, Gilk raises three issues, which we consolidate and restate as 1) whether sufficient evidence supports Gilk's convictions and 2) whether Gilk's sentence is inappropriate in light of the nature of the offenses and his character. Concluding that sufficient evidence supports Gilk's convictions and that his sentence is not inappropriate, we affirm.

Facts and Procedural History

On the morning of January 2, 2008, workers performing a construction project at Major Tool and Machine, Inc., in Indianapolis arrived at their jobsite and discovered the ignition systems for two forklifts had been damaged, apparently in an attempt to hotwire them. The workers contacted the police and employees of Major, who in turn reviewed a video surveillance recording of Major's property. The recording of December 31, 2007, depicts a person operating a forklift on company property and another person walking nearby around 10:36 p.m. Several minutes later, a white pickup truck towing a yellow, flatbed trailer pulls alongside the forklift before disappearing from the cameras' view. Approximately four hours later, around 2:39 a.m. on the morning of January 1st, two men are standing near a set of six-foot diameter, three- to four-hundred pound metal rings. Minutes later, the white pickup truck recorded previously parks next to the rings, a forklift loads them onto the truck's trailer, and the truck departs. Suspecting that

whoever took the rings might attempt to sell them as scrap, on January 3rd Major sent facsimile notices of the incident to scrap metal dealers in Indiana, Illinois, and Ohio.

Major's suspicion was confirmed. Around 9:00 a.m. on the morning of January 2nd, Blake Hibler, an employee with SW Industries, an Indianapolis scrap metal dealer, observed two men in a white pickup truck with a yellow, flatbed trailer pull into the scrap yard. The driver, later identified as Gilk, offered to sell Hibler several metal rings that were on the trailer. Hibler offered Gilk $140, but Gilk claimed the rings were "worth much more than that." Transcript at 89. After consulting with his superior, Hibler and Gilk eventually agreed on a price of $160. The next day SW Industries received Major's facsimile notice and contacted the company. Shortly thereafter, a Major employee confirmed the rings Gilk sold were the same rings stolen from Major's property in the early morning hours of January 1st.

On January 16, 2008, the State charged Gilk with burglary, a Class C felony; conversion, a Class C felony; theft, a Class D felony; and two counts of criminal mischief, one as a Class A misdemeanor and the other as a Class B misdemeanor.[1] On August 13, 2008, the trial court presided over a bench trial, at which it heard testimony from Hibler, Gilk, and a Major employee, among others, and also admitted several exhibits into evidence, including the video surveillance recording of the incident. Based on this evidence, the trial court found Gilk guilty as charged and entered judgments of conviction on all counts. At a September 2, 2008, sentencing hearing, the trial court sentenced Gilk to terms of four years for Class C felony burglary, four years for Class C

[1] The burglary and theft charges were related to the metal rings, the conversion charge to the unauthorized operation of the forklift, and the criminal mischief charges to the damage to the forklifts' ignition systems. See Appellant's Appendix at 21-23.

felony conversion, one and one-half years for Class D felony theft, one year for Class A misdemeanor criminal mischief, and six months for Class B misdemeanor mischief. The trial court also ordered that Gilk serve these terms concurrently, resulting in an aggregate sentence of four years with the Indiana Department of Correction. Gilk now appeals.

Discussion and Decision

I. Sufficiency of Evidence

Gilk argues insufficient evidence supports his convictions. Before addressing this argument, we note the following standard of review:

> In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment . . . . Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007) (citations omitted), trans. denied.

Gilk concedes there is sufficient evidence to convict the individuals depicted in the video recording of the crimes he was ultimately found to have committed,[2] but nevertheless contends his possession and sale of the metal rings on January 2nd does not permit a reasonable inference that he was one of those individuals. Gilk's argument thus requires us to address the so-called "unexplained possession" rule; it provides that unexplained possession of recently stolen property permits an inference of guilt of theft

[2] Given Gilk's concession, we will forego a lengthy recitation of the statutory elements of each offense, but note the following statutes under which Gilk was convicted: Indiana Code sections 35-43-2-1 (burglary); 35-43-4-3(c) (conversion); 35-43-4-2(a) (theft); 35-43-1-2(a)(2) (B misdemeanor criminal mischief); and 35-43-1-2(a)(2)(A) (A misdemeanor criminal mischief).

of that property. Miller v. State, 563 N.E.2d 578, 581 (Ind. 1990); Underhill v. State, 247 Ind. 388, 389, 216 N.E.2d 344, 345 (1966); see also Smathers v. State, 1874 WL 5738, at *1 (Ind. 1874) ("[W]hen it is proved that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession; and if he fails to satisfactorily account for such possession, or gives a false account, the presumption arises that such person is the thief."). The rule also permits an inference of guilt of burglary if there is evidence that a burglary was in fact committed, Allen v. State, 743 N.E.2d 1222, 1230 (Ind. Ct. App. 2001), trans. denied, which applies here given Gilk's concession.

Two of the rule's key terms are worth describing in further detail. First, in determining whether possession was recent, a reviewing court considers

> not only the length of time between the theft and the possession but also the circumstances of the case (such as defendant's familiarity or proximity to the property at the time of the theft) and the character of the goods (such as whether they are readily salable and easily portable or difficult to dispose of and cumbersome).

Id. (quoting Morgan v. State, 427 N.E.2d 1131, 1133 (Ind. Ct. App. 1981)). However, "[w]here the length of time between the crime and the possession is short, that fact itself makes the possession recent." Id. Second, possession is "'unexplained' when the trier of fact rejects the defendant's explanation as being unworthy of credit." Id.

Turning first to whether Gilk's possession was recent, we note that although such an inquiry is largely dependent on the particular facts and circumstances of each case, see id. at 1231 n.11, a time lapse of one to two days between the theft and the possession has been deemed recent, see Morgan, 427 N.E.2d at 1132 (citing cases). As a starting point,

then, this case is consistent with the cases cited in Morgan because slightly over thirty hours elapsed between the theft (2:39 a.m. on January 1st) and Gilk's delivery of the metal rings to SW Industries (9:00 a.m. on January 2nd). However, as the State points out, the thirty-hour lapse is arguably shorter still because SW Industries was closed on January 1st for the New Year's holiday and reopened at 7:30 a.m. on the 2nd. To use the State's words, one could reasonably infer from this evidence that Gilk's possession of the metal rings was recent because they "were sold to the scrap yard almost at the first possible moment they could be sold." Appellee's Brief at 6. Moreover, to round out the other factors mentioned in Allen that are indicative of whether possession is recent, we note that although there was no evidence Gilk was familiar with or in proximity to the metal rings at the time of the theft, the rings themselves were cumbersome – each weighed three to four hundred pounds, making a series of quick exchanges unlikely – and perhaps more significant, when Gilk sold the rings, he was driving the same truck and trailer that had hauled them away from Major's property. Accordingly, we conclude the State presented sufficient evidence for a reasonable trier of fact to find that Gilk's possession was recent.

Having determined there is sufficient evidence that Gilk's possession was recent, the question becomes whether his possession is unexplained. As Allen instructs, this inquiry is typically resolved by the trier of fact making a credibility determination, which, on appeal, becomes a determination that a reviewing court will not second-guess. 743 N.E.2d at 1230; see also Ward v. State, 260 Ind. 217, 220-21, 294 N.E.2d 796, 798 (1973) ("The mere fact that appellant testified concerning his possession of the lawn

mower does not automatically 'explain' his possession. Such possession remains unexplained unless the trier of fact believes the testimony submitted by the appellant."). In this case, however, the trial court based its credibility determination on a finding that is not supported by the evidence. To understand this oversight, it is necessary to describe Gilk's explanation for his possession of the metal rings in further detail.

Gilk's explanation for his possession of the rings was essentially that he was an unwitting accomplice. Gilk testified he went to his friend Pete Davis's house on the morning of January 2nd, and Davis asked Gilk to deliver the metal rings to SW Industries. According to Gilk, Davis had already negotiated a price of $185 for the metal rings, but was unable to deliver them himself because he had been involved in an automobile accident that morning. Gilk further testified that he agreed to deliver the rings as a favor to Davis because Davis needed the money to buy food for his family and that Davis's seventeen-year-old son, Ted, rode with him because he did not know where SW Industries was located.

In response to Gilk's testimony, the State recalled Hibler, the SW Industries employee who dealt with Gilk, as a rebuttal witness. Hibler testified on rebuttal that he knew Ted Davis and had "[n]o doubt in [his] mind" that the person who accompanied Gilk was not Ted Davis. Tr. at 155. The trial court determined that because Hibler's testimony contradicted part of Gilk's explanation, Gilk lacked credibility. And because Gilk lacked credibility, the trial court determined his possession of the rings was unexplained, which in turn permitted the trial court to infer guilt.

The problem with this reasoning, however, is that there were two Ted Davises – the seventeen-year-old Ted Davis that Gilk claimed accompanied him, and a Ted Davis who is Pete's brother (i.e., the seventeen-year-old Ted Davis's uncle). See id. at 151-52. In his rebuttal testimony, Hibler was referring to the elder Ted Davis as the Ted Davis he knew. See id. at 156 ("Q How – how old is the Ted Davis that you know? A The Ted Davis I know, I would say is somewhere in that 30 to 35 range, I would guess."). Thus, when Hibler stated he had "[n]o doubt in [his] mind," that the person who accompanied Gilk was not Ted Davis, id. at 155, he was merely stating that the elder Ted Davis did not accompany Gilk, which is consistent with Gilk's testimony that the younger Ted Davis accompanied him.

We do not fault the trial court for this oversight, as the record is somewhat confusing on this point.[3] Nevertheless, the question remains whether this oversight prevents us from affirming the trial court's credibility determination. On the one hand, the oversight is significant because in announcing its verdict, the trial court indicated that

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[3] At the September 2, 2008, sentencing hearing, the trial court realized its oversight and made the following remarks:

> Okay. Before we talk about the report, I want to talk about our last time together. We had a – a trial and the Court made a decision at the end of that trial to enter convictions on these counts. The Court, in an effort to explain how it reached its conclusion, talked about the fact that it found you to be less credible as a witness than the witnesses put on by the State. And, in an effort to demonstrate that, the Court chose an example that was a faulty example. I relied upon my memory on a particular thing, not as the primary reason that you were convicted, but as an example of why I reached that conclusion, and you caught that immediately, and you were paying attention; you're a smart guy, so you caught that immediately, and you brought it to my attention, but – but I didn't realize at the time that you were right and I was wrong, that I'd misremembered that. So I want to apologize to you for that and I want to make a record that you were right and I was wrong. The – the example I gave was an effort to explain why I reached that decision. There were many other reasons. You were here facing a – a sentence whereas those other witnesses were here with nothing to lose in telling the truth. So there were – there were many reasons that I found your testimony to be less credible and – and so explaining that example doesn't change my conclusion. So we're gonna [sic] go forward today, but I wanted you to know that I had reasons other than – I didn't want you to think that one piece of testimony was the only thing standing between you and freedom and that I had gotten that little example wrong.

Id. at 190-91.

the sole reason it was discounting Gilk's credibility was because Hibler's testimony contradicted Gilk's regarding who accompanied him to SW Industries. Indeed, at one point Gilk himself even attempted to correct the trial court on this point, see id. at 178, which led to a lengthy discussion among the parties and the trial court regarding whether the trial court's characterization of the evidence was accurate, see id. at 178-86. This discussion culminated in the trial court reiterating its original determination, specifically that it found Gilk lacked credibility because his testimony was contradicted by Hibler's testimony, see id. at 186-88. As the foregoing discussion demonstrates, however, the record does not support the trial court's reasoning on this point.

On the other hand, we do not interpret our standard of review as necessarily requiring reversal where the trial court's determination of credibility is not supported by the record. The standard itself is cast in objective terms – whether a reasonable trier of fact, viewing the evidence in a light most favorable to the verdict, could conclude the defendant was guilty beyond a reasonable doubt, Perez, 872 N.E.2d at 213, not whether the particular manner in which the trier of fact arrived at its decision supports guilt beyond a reasonable doubt. Given this objective standard, we note there is at least one other point of evidence in the record that a reasonable trier of fact could have used to discount Gilk's credibility, and in turn find that his possession was unexplained. Specifically, Gilk testified Pete Davis had negotiated a price for the metal rings before Gilk delivered them. However, the State argued in closing that Gilk was "actively negotiating" a price for the rings with Hibler, id. at 162, and Hibler's testimony supports this argument:

Q [Gilk]'s the person that you talked with the whole time during this process?
A Yes.
Q Okay. And do you recall what you told him this is what it's worth, this is what I'm willing to pay you?
A I – you know, when they pull into our yard, it's pretty much they either know what the price is or they have a really good idea as to what the price is. So generally we don't discuss any pricing on the scale unless they ask for it. I told him it was unprepared and told him where to go and that was kind of the extent of the conversation on the scale.
Q Okay.
A It was pretty short and brief, cordial.
Q At any point did he indicate to you that he didn't agree with the price that – or the money that was given to him?
A Yes. When he came in to get paid, I believe we ended up paying him 160 at that time and I think initially we were going to pay him 140 and he said it was worth more than that.
Q Okay.
A So I went and asked our owner, president, and he said, yeah, that's fine do that so . . .
Q Okay. So you ended up paying him what he wanted?
A I don't know if it was what he wanted. We just gave him more so . . .
Q Okay. But – and again, was the other person that was with him, the other man doing any of the talking and negotiating?
A I do not remember the other person at all.
. . .
Q Do you recall if [Gilk] made any other statements to you at that point other than negotiating the price?
A No, I do not.

Id. at 88-89, 91. Given this testimony, a reasonable trier of fact could have found Gilk negotiated a price on his own, which contradicts his testimony that Pete Davis had already done so. Such a finding would have permitted a reasonable trier of fact to discount Gilk's credibility, which in turn supports a reasonable inference that his possession is unexplained. Such an inference, coupled with our conclusion above that sufficient evidence supports a finding that Gilk recently possessed the rings, means the

trier of fact could have applied the unexplained possession rule and inferred Gilk's guilt. Accordingly, we conclude sufficient evidence supports Gilk's convictions.

II. Appropriateness of Sentence

Gilk argues his sentence is inappropriate. This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and recognize the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offenses and the character of the offender. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. In conducting this review, however, the burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Gilk to concurrent terms of four years for Class C felony burglary, four years for Class C felony conversion, one and one-half years for Class D felony theft, one year for Class A misdemeanor criminal mischief, and six months for Class B misdemeanor mischief, resulting in an aggregate sentence of four years with the Indiana Department of Correction. Indiana Code section 35-50-2-6(a) states, "A person

who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Thus, Gilk effectively received the Class C felony advisory sentence for his crimes.

Regarding the nature of the offenses, Gilk points out that he was unarmed when he committed the offenses, that the stolen property was eventually returned to Major, and that although there was some property damage, no one was physically injured. Gilk further notes that in Fry v. State, 837 N.E.2d 1012, 1014 (Ind. 2005), our supreme court reduced an enhanced sentence for Class B felony burglary from the statutory maximum to the advisory based in part on similar circumstances, specifically that the defendant was unarmed and that there was an absence of violence. However, Fry's revision from the statutory maximum to the advisory supports, rather than undermines, Gilk's sentence. Stated differently, that Gilk's offenses did not involve violence or weapons is accounted for in the fact that he received the advisory sentence. As to Gilk's other claim that the stolen property was eventually returned to Major, such recovery was due to Major's efforts, not a realization by Gilk of the wrongfulness of his actions.

Gilk does not argue that his character renders his sentence inappropriate. Nevertheless, we note the trial court found as a mitigating circumstance that Gilk's dependents would endure hardship during his incarceration. To the extent this mitigator comments favorably on Gilk's character, however, we note Gilk's criminal history is extensive. The presentence investigation report discloses a fairly steady stream of convictions over the last twenty years. Gilk disputed some of these convictions, but even considering those he did not dispute – a 1989 conviction for shoplifting in New Jersey, a

1990 conviction for possession of cocaine in North Carolina, a 2006 conviction for attempted burglary in Illinois, and a 2007 conviction for theft in Florida – it becomes apparent that Gilk's advisory sentence is hardly inappropriate.[4]

Conclusion

Sufficient evidence supports Gilk's convictions, and his sentence is not inappropriate in light of the nature of the offenses and his character.

Affirmed.

DARDEN, J., and BAILEY, J., concur.

[4] Gilk also has pending charges in Clinton County for theft, burglary, criminal mischief, and conversion and in Morgan County for resisting law enforcement, theft, criminal recklessness, and false informing. Moreover, Gilk committed the instant offenses while on probation in relation to his attempted burglary conviction in Illinois.