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IN THE
COURT OF APPEALS OF INDIANA

ELLIOTT J. WELCH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1006-CR-673
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 24
The Honorable Annie Christ-Garcia, Judge
Cause No. 49F24-0910-FD-86980

May 25, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Elliott J. Welch (Welch), appeals his conviction for theft, a Class D felony, Ind. Code § 35-34-4-2.

We affirm.

ISSUE

Welch raises one issue on appeal, which we restate as follows: Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he committed theft.

FACTS AND PROCEDURAL HISTORY

Just after midnight on July 26, 2009, Welch and Donald Perkinson (Perkinson) entered the Admiral Petroleum Station 157 (the Admiral) located on Crawfordsville Road in Marion County, Indiana. Welch and Perkinson had been in the Admiral multiple times before, and the cashier, Victoria Padolfo (Pandolfo), knew who they were. Shortly after Welch and Perkinson entered the store, Welch commented to Perkinson that, "we should steal some cigaretts….[Y]ou can make some money." (Transcript p. 48). Perkinson agreed with Welch, so while Welch distracted Pandolfo, Perkinson reached over the counter and grabbed several cartons of cigarettes. He then placed the cartons down his pants so that Pandolfo would not notice he was stealing them. Pandolfo saw Perkinson reach over the counter but just thought that he was playing around because Perkinson had pretended to steal items in the past.

Before leaving the store, Perkinson gave some of the cartons to Welch, and Welch stuck those cartons down his pants. Welch also bought two "swishers."[1] (Tr. p. 95). Then,

[1] Pandolfo indentified at trial that "swisher" is a slang term for a cigar.

Perkinson and Welch left the Admiral without paying for the cigarettes and went to Welch's home. There, they divided the cigarettes and each took a share.

The next day, Lisa Nicholas (Nicholas), another Admiral employee, visited Welch's father along with her boyfriend. Nicholas' boyfriend was friends with Welch's father. While Nicholas and her boyfriend were at Welch's house, Welch offered to sell them cigarettes. Welch told Nicholas that he had picked up the cigarettes at the Admiral and "walked out." (Tr. p. 102). After receiving this information, Nicholas reported the theft to her supervisor at the Admiral, Eva Nunley (Nunley). Nicholas' boyfriend also reported the theft to Pandolfo that Welch and Perkinson "were bragging about stealing cartons." (Tr. pp. 87-8). Nunley subsequently watched the surveillance video from July 26, 2009, and saw that the theft had occurred. She identified both Perkinson and Welch on the videotape.

On October 16, 2009, the State filed an Information charging Welch with theft, a Class D felony, I.C. § 35-43-4-2. On April 13, 2010, a jury trial was held. At the close of evidence, the jury found Welch guilty, and, on May 26, 2010, the trial court sentenced Welch to 365 days, with 361 days suspended.

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

DISCUSSION AND DECISION

Welch contends that the State failed to prove beyond a reasonable doubt that he committed theft. When reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied.* In addition, we only consider the evidence most

favorable to the verdict and reasonable inferences stemming from that evidence. *Id.* We will only reverse a conviction when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.* At 212-13.

In order to establish that Welch committed theft as a Class D felony, the State was required to prove beyond a reasonable doubt that Welch "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." I.C. § 35-43-4-2. Welch argues that the State did not prove that he had the intent to deprive the Admiral of the cigarettes, because the State merely proved that Welch had the opportunity to commit the crime. In support of this argument, Welch notes that Pandolfo did not see him steal the cigarettes.

Welch also cites *McMahel*, where we reversed a conviction of theft on the ground that a defendant's mere presence at the scene of a crime is not sufficient to sustain a conviction. *McMahel v. State*, 609 N.E. 2d 1175 (Ind. Ct. App. 1993). In *McMahel*, McMahel and others spent the night drinking at a bar named the Green Lantern Tavern. *Id.* At 1176. When the bartender locked the doors and left for the night, she saw McMahel and two others sitting on a ledge by the front door of the bar. *Id.*

Half an hour later, Crawford County Sheriff Deputy Ronald Roberts (Deputy Roberts) drove past an area near where McMahel lived with his parents and observed a group of three or four people walk across the highway into the bushes, carrying an object about the size of a case of beer. *Id.* Deputy Roberts also noticed that the security light above the back door of the tavern was out and that the back door had been forced open. *Id.* at 1177. Upon

investigation, the owner of the tavern determined that four cases and two pints of beer had disappeared, along with two half-pints of Jack Daniel's whiskey. *Id.* A witness saw McMahel and at least two others return to McMahel's house carrying a case of Budweiser beer, two cans of Budweiser, and two bottles of whiskey. *Id.* McMahel, though, was not carrying anythng. *Id.*

Based on the evidence, McMahel was charged and convicted of burglary and theft. *Id.* On appeal, we reversed his convictions, noting that the evidence was insufficient because it was based solely on McMahel's "opportunity" to commit the burglary and theft. *Id.* at 1178.

Welch argues here that, because Pandolfo did not see him steal the cigarettes, his conviction is similarly based on his 'opportunity' to commit the theft. We find flaws in Welch's comparison to *McMahel*, however, because there is sufficient evidence to connect Welch to the theft of the cigarettes other than his presence at the crime scene. Perkinson testified that Welch suggested the theft, helped Perkinson by distracting Pandolfo, and helped carry some of the cartons of cigarettes out of the store in his pants. This testimony was further corroborated by Nicholas, who testified that Welch had tried to sell her the stolen cigarettes and had admitted to her that he had taken the cigarettes from the Admiral and

"walked out." (Tr. p. 102). Accordingly, we conclude that there was sufficient evidence to prove that Welch committed the theft.

CONCLUSION

Based on the foregoing, we conclude that the State produced sufficient evidence to prove beyond a reasonable doubt that Welch committed theft.

Affirmed.

DARDEN, J., and BARNES, J., concur.