



## **STATEMENT OF THE CASE**

Michael Bell appeals his conviction for attempted theft, as a Class D felony, and his adjudication as an habitual offender following a bench trial. He presents a single issue for our review, namely, whether the State presented sufficient evidence to support his conviction.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On July 6, 2010, at approximately 3:00 p.m., Indianapolis Metropolitan Police Officers Christopher Frazier and Danny Reynolds were dispatched to an abandoned recreational facility in Indianapolis on a report of a theft in progress. When the officers arrived at the scene, they observed two men, subsequently identified as Bell and Nathaniel Dawn, standing near a pickup truck on the perimeter of the property. Bell was loading what looked like scrap metal into the bed of the pickup truck, and Dawn was holding what looked like a metal pole in his hands. After Officer Frazier identified himself as a police officer and ordered both men to stop, Bell stopped what he was doing and put his hands on the truck. Dawn dropped the pole he was holding and fled the scene. Officer Frazier quickly apprehended Dawn.

The State charged Bell with burglary, as a Class C felony, and attempted theft, as a Class D felony. The State also charged Bell with being an habitual offender. At the beginning of the trial, the State dismissed the burglary charge. The trial court found Bell guilty of attempted theft and adjudicated him to be an habitual offender, and the court entered judgment of conviction and sentence accordingly. This appeal ensued.

## DISCUSSION AND DECISION

When the sufficiency of the evidence to support a conviction is challenged, we neither reweigh the evidence nor judge the credibility of the witnesses, and we affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 905-06 (Ind. 2005). It is the job of the fact-finder to determine whether the evidence in a particular case sufficiently proves each element of an offense, and we consider conflicting evidence most favorably to the trial court's ruling. Id. at 906.

To prove attempted theft as charged, the State was required to show that Bell knowingly or intentionally exerted unauthorized control over the property, that is: metal fixtures and/or fence parts, of Westwood Recreation Club,<sup>1</sup> with the intent to deprive Westwood Recreation Club of any part of the value or use of said property, by engaging in conduct, that is: placing the items in a truck bed, which conduct constituted a substantial step toward commission of said crime of theft. See Ind. Code §§ 35-41-5-1, 35-43-4-2.

The State presented evidence that Officer Reynolds observed Bell loading “scrap metal and other things” into the back of the pickup truck. Transcript at 26. And Officer Reynolds saw Dawn holding a large metal pole before he fled into the woods. At trial,

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<sup>1</sup> The evidence shows that the attempted theft occurred on the premises of the Westwood Recreation Club, not the Westwood Country Club, as erroneously listed in the information. For the first time on appeal, Bell contends that the evidence is insufficient to show that he attempted to take property from the Westwood Country Club, as charged, because no such entity exists. Bell made no objection to the error at trial, and the variance between the pleading and the proof presented at trial is not fatal. Bell does not allege that the variance misled him in the preparation of his defense, and he is not in danger of twice being convicted for this attempted theft. See Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997).

Kenneth Magee, one of the owners of the property, looked at photographs of the items police found in the back of the pickup truck and testified that the piping in the truck “seem[ed] to be the galvanized pipe or similar to the galvanized pipe that was stored alongside the pool area” on the property. Id. at 67-68. And Magee testified that when he inspected the property following the attempted robbery, “the galvanized piping was what was missing[.]” Id. at 68. Magee also testified that there were propane tanks missing from the property and that they were “the same type of tank that was [in the bed of the pickup truck].” Id. at 84.

Bell contends that Magee’s testimony regarding ownership of the items shown in the photographs of the back of the pickup truck was equivocal and, therefore, insufficient to support his conviction. In particular, Bell maintains that Magee did not personally inspect the items in the truck, but only saw them in photographs. And Magee could do no more than state that the items looked similar to items that had been kept on the property and were now missing. Magee testified that he could not be certain that the items were the same ones missing from the property. Finally, Bell points out that Magee was not immediately called to inspect the property for missing items until one or more days had passed since Bell’s arrest, and others could have entered the property and taken items in the interim.

However, circumstantial evidence is generally sufficient to establish identity or ownership of stolen property. Thomas v. State, 423 N.E.2d 682, 686 (Ind. Ct. App. 1981). This is especially true where, as here, allegedly stolen property lacks identifying characteristics, such as a serial number or brand name. The testimony of the police

officers, who observed Bell placing metal items into the bed of the pickup truck parked on the premises of the Westwood Recreation Club, and that of Magee, who identified the items in the truck as the same or similar to those missing from the property, supports a reasonable inference that Bell took a substantial step toward stealing those items from the Club. Bell's contentions on appeal amount to a request that we reweigh the evidence, which we will not do. The State presented sufficient evidence to support Bell's conviction for attempted theft.<sup>2</sup>

Affirmed.

ROBB, C.J., and CRONE, J., concur.

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<sup>2</sup> Because we affirm Bell's conviction for attempted theft, his adjudication as an habitual offender also stands.