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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER COLLINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1010-CR-1157
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
The Honorable Mary Ann G. Oldham, Commissioner
Cause No. 49F18-1004-FD-32919

June 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Christopher Collins appeals his conviction and sentence for theft as a class D felony.[1] Collins raises three issues, which we revise and restate as:

I. Whether the trial court erred in admitting testimony of observations made using surveillance cameras;

II. Whether the court abused its discretion in sentencing Collins; and

III. Whether Collins's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On April 23, 2010, Edna Deppe, a corporate loss-prevention manager, was working in the camera room of a K-Mart store in Marion County. The camera room in the store had sixty-seven sensamatic cameras.

Deppe noticed Collins in the hardware department of the store through the use of the surveillance cameras. Collins opened a package of double-edged razor blades, walked over to the sporting goods department, and placed the blades into his pocket. Collins then went to the grocery area of the store, opened bags of candy, ate some candy, and put the bags back. Collins went to the menswear area of the store, removed a tag from a t-shirt, and "stuck the shirt down his pants." Transcript at 9. Collins then went to the hosiery department, opened a pack of socks, and put socks down the front of his pants. Collins walked past the cash registers and exited the store without paying for any of the items. Deppe was able to observe all of Collins's movements using the cameras and viewing the video screens in the camera room, and at no point did Deppe ever lose visual contact of Collins.

[1] Ind. Code § 35-43-4-2 (Supp. 2009).

Two store associates stopped Collins outside the store. After re-entering the K-Mart store, Collins removed the shirt and socks from his pants and admitted taking the items. The blades were found in Collins's pocket during a search by the store associates.

On April 24, 2010, the State charged Collins with theft as a class D felony. During the bench trial, the court admitted, over Collins's objection on hearsay grounds,[2] the testimony of Deppe. The court found Collins guilty as charged and sentenced him to 1095 days.

I.

The first issue is whether the trial court erred in admitting certain testimony of Deppe regarding her observations using the store's surveillance cameras. Generally, we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. Roche v. State, 690 N.E.2d 1115, 1134 (Ind. 1997), reh'g denied. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995).

Collins argues that the court abused its discretion by allowing Deppe to testify to what the surveillance cameras depicted without either offering the recorded images or showing that the images were unavailable. Collins argues that Deppe's testimony was

[2] Specifically, defense counsel stated: "Objection Judge. She is testifying to hearsay now. The camera is hearsay, it is not here in evidence. I don't think she should be allowed to testify unless the camera is here." Transcript at 5.

inadmissible hearsay, that admitting Deppe's testimony without a showing that recordings from the surveillance cameras were unavailable violated the best evidence rule, and that the error in admitting Deppe's testimony prejudiced him. In support of his argument that Deppe's testimony was hearsay, Collins argues that Deppe testified to what the store's surveillance cameras showed and that "[t]he images from the cameras were statements within the meaning of the hearsay rule because they were non-verbal conduct intended as an assertion that Collins was doing what the images purported to reveal . . . ." Appellant's Brief at 7. The State argues that testimony of observations made through surveillance cameras is not hearsay, that Collins waived his claims regarding the best evidence rule, that the best evidence rule does not apply, and that any error in admitting Deppe's testimony is harmless.

Hearsay is an out of court statement offered to prove the truth of the matter asserted and is inadmissible unless it falls under an exception. Pelley v. State, 901 N.E.2d 494, 504 (Ind. 2009) (citing Ind. Evidence Rules 801(c), 802), reh'g denied. "A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Ind. Evidence Rule 801(a). To be an assertion, the statement must allege a fact susceptible of being true or false. Pritchard v. State, 810 N.E.2d 758, 760 (Ind. Ct. App. 2004).

In Pritchard v. State, this court found that testimony by a correctional officer and nurse regarding what they observed on a jail surveillance recording was not inadmissible hearsay. 810 N.E.2d 758, 760-761 (Ind. Ct. App. 2004). The court noted that the testimony of the witnesses was a recounting of what they saw in the recording, that "[f]or

purposes of the admissibility of their testimony, this is no different than if they had been standing on cell block E-5 observing the incident," and that "[t]hey clearly can testify to things that are within their personal knowledge." Id. at 760. The court also concluded that the recording itself was not hearsay. Id. at 761. Specifically, the court noted that the defendant's conduct "was not intended to be an 'assertion' by him within the meaning of our rules of evidence." Id.

Here, Deppe testified that she observed Collins using the store's multiple surveillance cameras and the monitors in the camera room. Like in Pritchard, we note that Deppe was merely recounting what she observed using the cameras and that, for the purposes of admissibility of her testimony, this is no different than if Deppe had been on the floor of the store observing Collins's activities. In addition, similar to the defendant's conduct in Pritchard, Collins's activities of putting razor blades in his pocket, stuffing a shirt and socks into his pants, and leaving the store without paying were not intended to be an assertion by him within the meaning of the rules of evidence. The court did not abuse its discretion in admitting Deppe's testimony regarding her observations of Collins using the store's surveillance cameras. See Pritchard, 810 N.E.2d at 760-761.[3]

We also note, as argued by the State, that Collins did not object to Deppe's testimony based upon the best evidence rule. As a result, this claim is forfeited. See

[3] Collins asserts that Pritchard "applied the wrong analysis" and that "[a] video recording is hearsay because it is an assertion by an out-of-court declarant—the camera that recorded the events depicted on the videotape" and that "[t]hat assertion—rather than the conduct of the person being videotaped—is what is at issue." Appellant's Brief at 8. In support of his argument, Collins points to the "silent witness" basis for introducing recordings as substantive evidence. Id. at 9. The State notes that the silent witness basis "applies only when the video or photograph is admitted into evidence." Appellee's Brief at 6. We note that no recording was introduced in this case, and we decline to find under the circumstances that the camera was the declarant or to otherwise depart from our decision in Pritchard.

Rode v. State, 524 N.E.2d 797, 800 (Ind. Ct. App. 1988) (holding that the defendant waived his argument on appeal related to the best evidence rule because the defendant objected at trial based upon hearsay and not the specific ground of the best evidence rule and noting that a defendant may not state one reason for an objection at trial and then rely upon another on appeal), reh'g denied, trans. denied; see also Lehman v. State, 730 N.E.2d 701, 703 (Ind. 2000) (holding that the defendant's argument based upon the best evidence rule was forfeited on appeal because the defendant did not object on that ground at trial).

Even if it could be concluded that it was error for the court to admit Deppe's testimony regarding what she observed using the surveillance cameras at the store, the error would have been harmless. Deppe also testified that she observed Collins, in person, when he removed the shirt and socks from his pants and admitted to taking the items and when the store associates found the razor blades in Collins's pocket. See Pritchard, 810 N.E.2d at 761 (holding that, even if it could be concluded that it was error for the trial court to admit the testimony regarding the contents of the recording, the error would have been harmless and the defendant was not prejudiced by the admission of the testimony).

II.

The next issue is whether the court abused its discretion in sentencing Collins. The Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218

(Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances before the court." Id. A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

The court identified as aggravating circumstances Collins's "lengthy criminal history and the fact that [he] did have to take it to trial and the fact that other opportunities that [he] had to succeed at . . . more . . . open type sentences other than the Department of Corrections have not been . . . successful." Transcript at 32-33 (ellipses in original). Collins argues that the court abused its discretion by using Collins's exercise of his right to trial as an aggravating circumstance. The State acknowledges that "to the extent that the trial court considered [Collins's] exercise of his right to a court trial as an aggravating circumstance, this was improper." Appellee's Brief at 10. The State argues,

however, that the error was harmless because the other aggravating factors, and in particular Collins's criminal history, were proper.

While the court erred in finding the fact that Collins took his case to trial to be an aggravator, we note that "a single aggravating circumstance may be sufficient to support the imposition of an enhanced sentence." Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001). As previously noted, the court identified other aggravating circumstances which were not challenged by Collins including his criminal history, which included theft as a class D felony; theft/receiving stolen property as a class D felony; forgery as a class C felony; receiving stolen property as a class D felony; and credit fraud as a felony. Collins also violated probation several times in connection with a number of the above convictions. We can say with confidence that the court would have imposed the same sentence if it considered only the remaining aggravating circumstances. We therefore conclude that the court did not abuse its discretion in sentencing Collins. See Shafer v. State, 856 N.E.2d 752, 758 (Ind. Ct. App. 2006) (affirming the defendant's sentence and holding that even if the court erred in finding one aggravator, the court found other aggravators which the defendant did not challenge), trans. denied.

III.

The next issue is whether Collins's sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) provides that this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the

defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Collins argues that a maximum sentence is inappropriate because he stole "$33.65 worth of items that were largely necessities at a time when he was homeless." Appellant's Brief at 13. Collins acknowledges his criminal history and that he has failed probation more than once and asserts that "were this a typical theft case, [his] criminal history might justify a maximum sentence." Id. at 14. Collins argues that he did not commit a typical theft, that he was inside the store for three and one half hours and could have tried to steal any number of frivolous or expensive items, but he attempted to steal only items which are essentially necessities for daily life. Collins argues that while these facts do not excuse his actions, they do "make them less opprobrious than most other thefts and most other class[]D felonies." Id. Collins further points to the cost of his incarceration for which taxpayers pay and requests this court to reduce his sentence to the advisory sentence. The State argues that Collins's "poor character as illustrated by his extensive criminal history provides ample reason not to disturb the sentence imposed by the trial court." Appellee's Brief at 12. The State also argues that Collins has had consistent contact with the criminal justice system since 1993, has prior convictions involving property offenses, and is "in the class of offenders that warrant significant punishment." Id. at 13.

Our review of the nature of the offense reveals that Collins entered a K-Mart store, put razor blades in his pocket, stuffed a t-shirt and socks in his pants, and left the store without paying for any of the items. Our review of the character of the offender reveals

that Collins's criminal history began in 1993 and includes convictions for theft, receiving stolen property, forgery, and credit fraud as well as misdemeanor convictions for public intoxication, harassment, battery, and operating a vehicle while intoxicated with a BAC between .08-.15, and several probation violations. Collins was on parole at the time he committed this offense. While Collins may have felt as though the items which he took from the store were not expensive and were necessities for him, the character of the offender weighs in favor of the maximum sentence and our review of the nature of the offense and the character of the offender does not lead us to conclude that Collins's sentence is inappropriate. See Shouse v. State, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006) (concluding in part that the defendant's three-year sentence for auto theft as a class D felony was not inappropriate given the defendant's criminal history), trans. denied.

For the foregoing reasons, we affirm Collins's conviction and sentence for theft as a class D felony.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.