Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

VICTORIA L. BAILEY
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

FILED
Jun 30 2011, 9:33 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

JAMES WHITFIELD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1008-CR-938
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable James B. Osborn, Judge
Cause No. 49F15-1004-FD-27780

June 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James Whitfield appeals his conviction of Class D felony theft.[1] Whitfield complains the trial court should have admitted a video tape of the crime, and challenges the sufficiency of the evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 5, 2010, Sarah Hill and Antwan Wills were working as asset protection associates for Wal-Mart. That day, Marlonda Tigner and Whitfield entered the Wal-Mart store. Hill and Wills watched Tigner and Whitfield on the store's security cameras.

While she walked through the aisles, Tigner stuffed t-shirts and a girl's jumpsuit into her jacket. Thereafter, Tigner and Whitfield selected some boys' shorts. Tigner took both pairs of shorts and stuffed them into her jacket as well. After Tigner and Whitfield passed the store's cash registers, store security intercepted them and asked them to return the items. Security recovered all of the stolen items from Tigner. Tigner and Whitfield were both charged with Class D felony theft.

Tigner testified at trial that Whitfield had nothing to do with the theft. Hills and Wills testified they saw Whitfield help Tigner commit the theft, and defense counsel did not object. The jury found Whitfield guilty of theft.

DISCUSSION AND DECISION

Hill and Wills testified they watched the live feed from the security cameras, but the State did not offer the video into evidence. This, Whitfield says, prevented him from

[1] Ind. Code § 35-43-4-2.

confronting all the witnesses against him.[2] Whitfield argues Hill and Wills' testimony concerning the video should have been inadmissible as hearsay, and the remaining evidence was insufficient to convict him.

1. Fundamental Error

We generally review admission of evidence under an abuse of discretion standard. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. Whitfield did not object to Hill and Will's testimony, so those issues are waived for appellate review. *Moore v. State*, 669 N.E.2d 733, 742 (Ind. 1996), *reh'g denied*. Whitfield attempts to overcome this waiver by arguing fundamental error.

Fundamental error occurs when a decision violates "basic and elementary principles, and the harm or potential for harm [can] not be denied." *Warriner v. State*, 435 N.E.2d 562, 563 (Ind. 1982). Fundamental error is a "narrow exception" to the waiver rule. *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002). We may review fundamental error even if there was no objection at trial. *Id.* The Sixth Amendment right to confront applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). This right is "fundamental." *Id.* at 403.

Whitfield offers no legal authority that recognizes or establishes a right to confront a video recording or other inanimate object, and we decline his invitation to so hold.

[2] The State admitted three videos into the record. Whitfield asserts a fourth video was not admitted into the record. The record does not establish whether that video was recorded and preserved.

In *Crawford v. Washington*, the Supreme Court clarified the right to confront a "witness" and cross-examine his or her "testimony." 541 U.S. 36, 51 (2004). In *Crawford*, the Court defined "witness" as one who "bears testimony." *Id*. While the Court did not specify the limits of the word "testimony," it used the word in reference to "statements" made by persons. *Id.* at 51, 68. In this case, Whitfield appears to assert a right to cross-examine a video. A video is not a "witness," and cannot testify. *Id.*

Accordingly, we hold there was no error in the admission of Hills and Will's testimony about a video that was not admitted into evidence.

2. Sufficiency of the Evidence

When reviewing sufficiency of evidence, we do not reweigh the evidence or determine the credibility of the witnesses. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002). We will affirm the conviction if the "probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). We review the evidence in the light most favorable to the verdict. *Hill v. State*, 513 N.E.2d 1216, 1216 (Ind. 1987).

To prove Whitfield committed Class D felony theft, the State must prove that he "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 . . . ." Ind. Code § 35-43-4-2. Whitfield was convicted based on accomplice liability and argues there was

insufficient evidence to prove he "knowingly" "aid[ed]" Tigner in committing Class D felony theft. *See* Ind. Code § 35-41-2-4 (defendant is an accomplice to a crime if he "knowingly or intentionally aids, induces, or causes another person to commit an offense." As an accomplice, defendant is guilty of the same crime as the principal).

There was sufficient evidence to convict Whitfield of theft. Two witnesses testified they watched Whitfield and his girlfriend select clothing. They saw his girlfriend hide the clothing in her jacket. Videotapes[3] from Wal-Mart security showed Tigner stuffing clothing into her jacket. Whitfield and Tigner had nothing in their cart and passed the cash registers on their way out of the store. When confronted by store security, Tigner revealed the stolen merchandise in her jacket.

Based on that evidence, the jury could reasonably infer the "probable and natural consequence[s]" of Whitfield's actions. *McGee v. State*, 699 N.E.2d 264, 265 (Ind. 1998) (holding an accomplice does not have to participate in every element of the crime, but is responsible for the "probable and natural consequence[s]" of the principal.) We decline Whitfield's invitation to reweigh the evidence, *Ritchie v. State*, 809 N.E.2d 258, 270 (Ind. 2004), *reh'g denied*, and hold the evidence was sufficient to convict him of theft.

CONCLUSION

Whitfield was not deprived of his Sixth Amendment right to confront a witness against him, and there was sufficient evidence to support his conviction. Accordingly, we affirm.

---

[3] These videos are distinct from the video Whitfield asserts should have been admitted.

Affirmed.

BAKER, J., and BRADFORD, J., concur.