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IN THE
COURT OF APPEALS OF INDIANA

ANGELA N. JACKSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 16A01-0810-CR-467
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DECATUR CIRCUIT COURT
The Honorable John A. Westhafer, Judge
Cause No. 16C01-0705-FD-131

July 7, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Angela Jackson ("Jackson") was convicted in Decatur Circuit Court of Class D felony theft and ordered to serve six months executed in the Department of Correction. Jackson appeals and raises the following arguments:

> I. Whether the trial court abused its discretion when it denied her motion for mistrial after the court was informed that a State's witness was related to a juror; and,
>
> II. Whether the evidence was sufficient to support her theft conviction.
>
> We affirm.

Facts and Procedural History

On or about May 27, 2007, Tracy Haines ("Haines"), a Walmart asset protection coordinator, observed Jackson walk out of the Walmart store without paying for thirty-four items worth a total of $95.69. Jackson was charged with Class D felony theft on May 30, 2007.

On June 30, 2008, a jury trial was held. During the jury's deliberations, Haines informed the prosecuting attorney that one of the jurors was his wife's aunt. Jackson moved for a mistrial. The State argued that the objection was waived. Without questioning the juror, the trial court denied the motion for a mistrial.

The jury found Jackson guilty as charged. Jackson filed a motion to correct error due to the juror's relationship with Haines. The motion was deemed denied by operation of Trial Rule 53.3. Jackson was sentenced to six months executed in the Department of Correction, with three of those months served on home detention and the remaining three months on work release. Jackson now appeals. Additional facts will be provided as necessary.

I. Motion for Mistrial

Jackson argues that the trial court abused its discretion when it denied her motion for mistrial. A mistrial is an extreme sanction that is warranted only when no other cure can be expected to rectify the situation. Agilera v. State, 862 N.E.2d 298, 308 (Ind. Ct. App. 2007), trans. denied. Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. Id. at 307. We will reverse the trial court's ruling only upon an abuse of that discretion. Id. Moreover, we afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. Id.

Article One, Section Thirteen of the Indiana Constitution provides that a criminal defendant has the right to a trial by an impartial jury. Pursuant to Indiana Jury Rule 17(a)(6), in criminal cases, "the parties shall make all challenges for cause before the jury is sworn to try the case, or upon a showing of good cause for the delay, before the jury retires to deliberate. The court shall sustain a challenge for cause if the prospective juror: . . . (6) is related within the fifth degree to the parties, their attorneys, or any witness subpoenaed in the case[.]"

> Generally, proof that a juror was biased against the defendant or lied on voir dire entitles the defendant to a new trial. A juror's bias may be actual or implied. Implied bias is attributed to a juror upon a finding of a certain relationship between the juror and a person connected to the case, regardless of actual partiality. Stated differently, a juror's relationship with one of the parties may raise a presumption of implied bias. Where an inference of implied bias arises, a trial court should analyze such potential bias by considering the nature of the connection and any indications of

> partiality. The court "must weigh the nature and extent of the relationship versus the ability of the juror to remain impartial."

Alvies v. State, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003), trans. denied (citations omitted).

During voir dire in this case, the first panel of prospective jurors was asked whether they knew Haines. However, the juror at issue in this appeal was not seated in the first panel, and during voir dire, she was not asked whether she knew Haines. See Tr. pp. 19, 48-56. During the jury's deliberations, Haines told the prosecutor that juror number five was his wife's aunt. Tr. p. 145. Jackson then moved for a mistrial. In response, the State argued that Jackson waived the claim by failing to ask the juror during voir dire whether she had a relationship with Haines. Tr. pp. 147-49.

After the relationship was disclosed, the trial court did not question the juror concerning whether she might be biased against Jackson. Importantly, Jackson also did not ask the court to allow her to question the juror as to whether the juror was biased. Furthermore, Jackson filed a motion to correct error arguing that she was entitled to a mistrial due to alleged juror bias, and could have, but failed to submit an affidavit from the juror in support of her motion. We also observe that Haines, not the juror, alerted the prosecutor to the fact that the juror was his wife's aunt. The record is devoid of any evidence that would establish whether the juror knew of the relationship.

"[T]o establish juror misconduct, the defendant must first present some specific, substantial evidence showing that a juror was potentially biased." Ward v. State, 736 N.E.2d 265, 270 (Ind. Ct. App. 2000). The fact that Haines and the juror were related by

marriage "does not give rise to an implication of bias per se." Id. (noting that although bias may be implied, "the fact that Ward and Juror Beatty were related within the fifth degree by marriage does not give rise to an implication of bias per se."). Therefore, we conclude that Jackson's failure to inquire as to whether the juror had a relationship with Haines, and failure to present any evidence that would support her claim of bias after the relationship was discovered, results in waiver of this issue on appeal. See West v. State, 755 N.E.2d 173, 184 (Ind. 2001) (stating that without an offer of proof, the issue is waived); Miller v. State, 623 N.E.2d 403, 412 (Ind. 1993) (holding that the defendant's failure to object to the manner in which the jury was chosen resulted in waiver of the issue on appeal.).

II. Sufficient Evidence

Jackson also argues that the evidence was insufficient to support her conviction for Class D felony theft. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To establish that Jackson committed Class D felony theft, the State was required to prove that Jackson knowingly or intentionally exerted unauthorized control over the property of another person with the intent to deprive that person of any part of its value or

use. Ind. Code § 35-43-4-2 (2004). The State alleged that "on or about May 27, 2007," Jackson knowingly took thirty-four items totaling $95.69 from the Greensburg Walmart store and attempted to leave the store without paying for said items. Appellant's App. p. 8.

Jackson argues that the State's witnesses's inability to testify as to whether the offense occurred on May 26th or 27th "undermines the credibility of the investigation by both the police and by Walmart." Appellant's Br. at 7. Jackson also notes that neither Haines nor the investigating police officer obtained a driver's license or other identification card from Jackson during their investigation, and this fact, combined with the inconsistent testimony concerning the date of the offense leads only to one conclusion: that a reasonable trier of fact could not have found Jackson guilty of theft. See id. at 8.

There was conflicting testimony at trial as to whether the theft was committed on May 26th or 27th. However, time is not an essential element of the offense of theft. See I.C. § 35-43-4-2. Moreover, a variance between the date alleged in the charging information and the evidence at trial is not fatal unless it misleads the defendant in the preparation of her defense or subjects her to the likelihood of another prosecution for the same offense. Sangsland v. State, 715 N.E.2d 875, 878-79 (Ind. Ct. App. 1999), trans. denied.

Haines testified that he saw Jackson place several items in a bag and it appeared that Jackson was trying to hide merchandise in her shopping cart. Haines continued to observe Jackson and told the store greeter not to stop Jackson if she attempted to leave

the store. Jackson walked past the registers without paying for the items, and Haines stopped after she walked through the first set of doors. Tr. pp. 78-79. During the investigation, Haines asked Jackson for all of her identifying information, including her date of birth, address and social security number. Both Haines and the investigating police officer identified Jackson in court as the person who committed the offense.

Jackson has not established that conflicting testimony as to whether the offense was committed on May 26th or May 27th misled her in the preparation of her defense. Furthermore, the State's evidence discussed above was sufficient to establish that Jackson committed Class D felony theft. Her argument to the contrary is merely a request to our court to reweigh the evidence and the credibility of the witnesses, which we will not do.

Conclusion

Jackson waived her claim of juror bias and the State presented sufficient evidence to prove that she committed Class D felony theft. Accordingly, her conviction is affirmed.

Affirmed.

RILEY, J., and KIRSCH, J., concur.