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ATTORNEY FOR APPELLANT:

JOEL M. SCHUMM
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

MARVIN ERVIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-1107-CR-347
	)	No. 49A02-1002-CR-123
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable James B. Osborn, Judge
Cause No. 49F15-0906-FD-57452

July 28, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Upon remand from our Supreme Court, we have been instructed to more fully address an issue that appellant-defendant Marvin Ervin presented in his direct appeal that involves the Proportionality Clause of the Indiana Constitution. Although our original opinion has been vacated in its entirety, we set forth the facts of the case and the disposition of the remaining issues in this appeal as were reported in our previous unpublished memorandum decisions[1] with minimal modifications.

Ervin appeals his conviction for theft,[2] a class D felony, and his adjudication as a habitual offender.[3] Ervin argues that the trial court abused its discretion in admitting various pawn shop documents under the business record exception to the hearsay rules, that the trial court erred in refusing to instruct the jury on the offense of conversion as a lesser included of theft, and that the class D felony classification for the offense of theft violates the Proportionality Clause of the Indiana Constitution.[4]

We conclude that the pawn shop documents were properly admitted into evidence, that the trial court did not err in refusing to give Ervin's tendered instruction on

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[1] Our Supreme Court had previously remanded this case to us, following the issuance of an unpublished opinion in 2010. See Ervin v. State, No. 49A02-1002-CR-123 (Ind. Ct. App. Sep. 28, 2010). The second remand was ordered on July 7, 2011, following the issuance of an unpublished memorandum decision on April 13, 2011.

[2] Ind. Code § 35–43–4–2.

[3] Ind. Code § 35–50–2–8.

[4] Ind. Const. Art. 1, § 16.

conversion, and that there was no violation of the Proportionality Clause in convicting and sentencing Ervin for theft.

FACTS

On June 9, 2009, at approximately 1:50 p.m., Ervin and Cameron Crowe visited Crystal Jones at Jones's apartment on East Michigan Street in Indianapolis. Ervin brought his bicycle with him, and pursuant to the building policy, Jones instructed Ervin to put the bicycle in the basement. When Ervin and Crowe left, Ervin took his bicycle with him, while Crowe carried out a red, ten-speed Huffy bicycle. That evening, shortly before 6 p.m., Ervin took the Huffy to Cash America Pawn and sold it for fifteen dollars.

The next day, Larry Johnson, another tenant in Jones's apartment building, reported that his bike had been stolen from the building's basement. Indianapolis Metropolitan Police Department Officer (IMPD) Thomas Goodin, who worked as an off-duty security guard at the apartment building, reviewed some video footage that had been taken the previous day from several cameras inside the apartment building. The video showed Ervin and Crowe visit Jones's apartment and then leave with Johnson's bicycle. After Jones identified both men, Officer Goodin filed a police report.

IMPD Detective Julie Busic entered Ervin's name in "Leads Online," a database that contained information entered by pawn shops throughout the country. Tr. p. 85. Detective Busic was informed on the data base that Ervin had pawned a red Huffy bicycle at the Cash America Pawn. Thereafter, Detective Busic contacted Detective Mary Horty of IMPD's pawn unit, who pulled a pawn card, which is created by Cash

America Pawn by duty of law that records the pawn transaction and which is maintained by IMPD's pawn unit. The pawn card contained Ervin's name and identifying information, the specific characteristics of the bicycle, Ervin's thumb print, and his signature. Detective Horty contacted Cash America Pawn to place a police hold on the bicycle and to retrieve the bill of sale created for the transaction. The bill of sale also listed Ervin's name, address, identifying information, his thumb print, and identifying information for the bicycle.

On June 19, 2009, the State charged Ervin with theft, a Class D felony. The State subsequently amended the charging information and alleged Ervin to be a habitual offender. At a jury trial that commenced on December 23, 2009, Ervin objected to the admission of the pawn card and the bill of sale because no testimony was offered establishing that the documents were made at or near the time of the event or that they were made by an individual with knowledge of the transactions.

The trial court overruled the objection and admitted both exhibits into evidence. At the close of the evidence and prior to instructing the jury, Ervin tendered a proposed jury instruction for conversion, a class A misdemeanor, which was overruled by the trial court on the basis that the evidence did not support it. After deliberation, the jury found Ervin guilty of theft and he subsequently pleaded guilty to being a habitual offender.

On January 11, 2010, the trial court sentenced Ervin to 910 days of incarceration for theft that was enhanced by 545 days on the habitual offender adjudication. Ervin now appeals.

DISCUSSION AND DECISION

I. Business Records Exception

Ervin first contends that the trial court abused its discretion when it admitted the pawn card and bill of sale into evidence pursuant to the business record exception of the hearsay rules. Specifically, Ervin argues that the State failed to establish that an individual with personal knowledge had prepared the documents near the time of the transaction. Thus, Ervin claims that the documents did not satisfy the requirements of the business records exception.

Questions regarding the admissibility of evidence are matters within the trial court's sound discretion. Brooks v. State, 934 N.E.2d 1234, 1240 (Ind. Ct. App. 2010), trans. denied. Thus, we review a trial court's decision to admit or exclude evidence using an abuse of discretion standard. Covey v. State, 929 N.E.2d 813, 819 (Ind. Ct. App. 2010). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Brooks, 934 N.E.2d at 1240. We will not reverse the trial court's admission of evidence absent a showing of prejudice. Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc., 834 N.E.2d 129, 133 (Ind. Ct. App. 2005).

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay is inadmissible unless admitted pursuant to a recognized exception. Ind. Evid. R. 802. The business records exception to the hearsay rule, Evidence Rule 803(6),

permits admission of records of regularly conducted business activity provided that certain requirements are met. Evidence Rule 803(6) provides that

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

To admit business records pursuant to this exception, the proponent of the exhibit may authenticate it by calling a witness who has a functional understanding of the record keeping process of the business with respect to the specific entry, transaction, or declaration contained in the document. Rolland v. State, 851 N.E.2d 1042, 1045 (Ind. Ct. App. 2006). The witness need not have personally made or filed the record or have firsthand knowledge of the transaction represented by it in order to sponsor the exhibit. Id. Rather, such person need show only that the exhibit was part of certain records kept in the routine course of business and placed in the records by one who was authorized to do so and who had personal knowledge of the transaction represented at the time of entry. Id. Records kept in the ordinary course of business are presumed to have been placed there by those who have a duty to so record and have personal knowledge of the transaction represented by the entry, unless there is a showing to the contrary. Id.

In this case, Christopher Steadmon, the manager of Cash America Pawn, testified in an effort to establish the foundational requirements for the admission of the pawn card

and bill of sale under the business records exception. Tr. p. 91-97. Steadmon identified the pawn card and the bill of sale as two documents generated by a Cash America Pawn customer service representative in the regular course of business at the time of the sales transaction. Id. at 94.

Steadmon clarified that prior to being able to complete these documents, each customer service representative was required to partake in a month-long training and a period of time shadowing another employee. It was determined that each employee executes a transaction the same way: first, the employee determines ownership of the item offered for sale and retrieves the identifying characteristics, including the serial number, make, and model of the item. Steadmon then explained that the employee enters this information, together with the identifying information from the seller, into the computer at the time of sale to generate the pawn card. Id. The employee can only take the personal identifying information from a state-issued identification card and the seller's thumb print is recorded on the pawn card. At the end of the transaction and in accordance with the law, the pawn card is mailed within twenty-four hours to IMPD.

Next, Steadmon explained the generation of a bill of sale. In addition to the pawn card, the customer service representative creates a bill of sale contemporaneous to the transaction. This bill of sale includes the same identifying information of the seller and the item being sold as on the pawn card. Id. The bill of sale and the pawn card are linked together by including the bill of sale's number at the bottom of the pawn card.

Through Steadmon's testimony, the State established that the pawn card and the bill of sale are kept in the routine course of Cash America Pawn's business. Moreover, the information contained in those documents was compiled contemporaneously with the information that Ervin provided and was placed into the record by a customer service representative who had personal knowledge of the transaction and who had a duty to generate accurate information. In light of this testimony, we conclude that the trial court properly admitted the pawn card and bill of sale into evidence as business records.

II. Jury Instruction

Ervin next contends that the trial court erred in denying his request to instruct the jury on criminal conversion, a class A misdemeanor, as a lesser included offense of theft. Specifically, Ervin argues that the instruction should have been given because the offenses are "one and the same." Appellant's Br. p. 12.

In reviewing a claim that the trial court refused to give a tendered instruction, we consider (1) whether the instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. Mayes v. State, 744 N.E.2d 390, 395 (Ind. 2001). The decision to give or deny a tendered jury instruction is left to the sound discretion of the trial court. Taylor v. State, 629 N.E.2d 852, 855 (Ind. Ct. App. 1994). We review the trial court's decision only for an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 962 (Ind. Ct. App. 2008).

Indiana appellate courts have consistently held that criminal conversion is an inherently lesser included offense of theft because conversion may be established by proof of less than all the material elements of theft. Shouse v. State, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006). Indiana Code section 35-43-4-2 states, in relevant part: "A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a class D felony." Pursuant to Indiana Code section 35-43-4-3, "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a class A misdemeanor." Clearly, the only element distinguishing theft from conversion is whether the defendant acted with intent to deprive a person of the value or use of that person's property.

Ervin asserts that the trial court abused its discretion by refusing to instruct the jury on conversion, in light of this court's opinion in Morris v. State, 921 N.E.2d 40 (Ind. Ct. App. 2010), trans. denied. In Morris, we held that a criminal conversion instruction as a lesser included offense of felony theft was warranted by the evidence. The evidence demonstrated that the defendant entered a department store and stuffed clothes into a plastic garbage bag, thus exerting unauthorized control over the merchandise. However, based on the evidence, we concluded that there was an evidentiary dispute as to whether Morris intended to deprive the store of the use and value of the clothing. Id. at 43.

Unlike the circumstances in Morris, there is no evidentiary dispute about Ervin's intent. More specifically, no evidence was presented at trial that Ervin's use of the

bicycle was temporary, that he was not exerting complete control over it when he took it to the pawn shop and sold it or that he did not intend to deprive the bicycle's owner of its use and value. Therefore, because there was no evidence supporting giving the instruction on conversion, we conclude that the trial court did not abuse its discretion in refusing Ervin's proposed tendered instruction.

III. Constitutionally Proportionate Penalty

In a related issue, Ervin maintains that his conviction must be set aside because the penalty for theft violates the Proportionality Clause set forth in Article I, Section 16 of the Indiana Constitution. Specifically, Ervin argues that the theft statute is unconstitutional and his conviction must be reduced to conversion because the offenses are proven by the same material elements. Therefore, Ervin asserts that the classification for theft as a class D felony violates the Proportionality Clause because that offense is "one and the same" as criminal conversion, a class A misdemeanor. Appellant's Br. p. 10.

The Proportionality Clause, as set forth in Article I, Section 16, of the Indiana Constitution, requires that "[a]ll penalties shall be proportioned to the nature of the offense." And our courts have consistently maintained that the nature and extent of penal sanctions are primarily legislative considerations." Balls v. State, 725 N.E.2d 450, 453 (Ind. Ct. App. 2000); Person, 661 N.E.2d at 593. Our review of a legislatively sanctioned penalty is very deferential, and we will not disturb the legislature's determination except upon a showing of clear constitutional infirmity. The analysis is "straightforward" where

the statutory punishment of a single crime is alleged to be constitutionally disproportionate. State v. Moss-Dwyer, 686 N.E.2d 109, 112 (Ind. 1997). Our Supreme Court has determined that "Section 16 applies 'only when a criminal penalty is not graduated and proportioned to the nature of an offense.'" Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993) (quoting Hollars v. State, 259 Ind. 229, 236, 286 N.E.2d 166, 170 (1972)). We are not free "to set aside the legislative determination as to the appropriate penalty merely because it seems too severe." Moss-Dwyer, 686 N.E.2d at 112. A sentence violates the proportionality clause where it is so severe and entirely out of proportion to the gravity of offense committed as "'to shock public sentiment and violate the judgment of a reasonable people.'" Pritscher v. State, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996) (quoting Cox v. State, 203 Ind. 544, 549, 181 N.E. 469, 472 (1932)).

As noted above, the element that distinguishes theft from conversion is the intent to deprive the other person of the property's value or use, an element not required for conversion. Morris, 921 N.E.2d at 42. Conversion is thus an inherently included offense of theft. Campbell v. State, 732 N.E.2d 197, 208 (Ind. Ct. App. 2000). Put another way, only if a jury concludes that the evidence established the additional element of intent will a theft conviction result.

Ervin's reliance on Morris, 921 N.E.2d at 42, for the proposition that the two offenses are one and the same and thus should have the same penalty, is unpersuasive. In Morris, we considered language from Irvin v. State, 501 N.E.2d 1139, 1142 n.3 (Ind. Ct. App. 1986), and stated that "from a practical standpoint the offenses appear to be one and

the same." Id. However, despite this pronouncement in 1986, our General Assembly has not merged the two offenses into one, amended the statutes to change the elements of the two offenses, or applied the same penalty to the two offenses. Hence, it is apparent that the legislature considers the crimes as two separate offenses warranting different levels of punishment. See Morris, 921 N.E.2d at 43 (recognizing that although some courts have suggested that there is no articulable difference between the elements of conversion and theft, the fact remains that our legislature has identified them as two separate crimes with two different penalty provisions); see also Common Council of Michigan City v. Bd. of Zoning Appeals of Michigan City, 881 N.E.2d 1012, 1016 (Ind. Ct. App. 2008) (applying the doctrine of legislative acquiescence when the court had "all but invited" the legislature to change the law, but many years later "[t]he General Assembly has yet to accept this invitation" and the Court had to "presume the General Assembly was satisfied with our holding").

We have also found, time and again, that an evidentiary distinction exists between the two offenses in practical application. See Shouse v. State, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006) (finding that a conversion instruction was not warranted by the evidence where there was no serious evidentiary dispute that the defendant intended to deprive the owner of the truck's value or use); M.Q.M. v. State, 840 N.E.2d 441, 446 (Ind. Ct. App. 2006) (finding the evidence insufficient for theft but sufficient for conversion where there was no evidence that the juvenile intended to deprive his parents of the value or use of the vehicle).

We also note that the circumstances here are unlike those in Poling v. State, 853 N.E.2d 1270, 1276 (Ind. Ct. App. 2006), where we determined that under the neglect of a dependent statute, a jury could find a defendant guilty of a class C felony for "cruel or unusual confinement or abandonment" or guilty of a class D felony for "abandon[ing] or cruelly confin[ing] the dependent." Id. In determining that a jury could characterize the crime as a class C felony or a class D felony for the same conduct, i.e., the cruel confinement of a dependent, we reduced the defendant's convictions to class D felonies and remanded for resentencing. Id. at 1277.

Unlike the neglect statute, we again note that the element of "intent to deprive" is the evidentiary distinction that exists between theft and conversion. In our view, we find nothing "incongruous or unfair" about the legislature's decision to punish the two crimes differently. See Ponciano v. State, 851 N.E.2d 305, 308 (Ind. Ct. App. 2006) (observing that the increased penalty for committing criminal recklessness with a vehicle was not disproportionate because the criminal recklessness statute provided a graduation of penalties on the basis that additional elements regarding the manner of the offense steadily increases the chance that serious injury may arise).

Finally, we reject Ervin's assertion that a prosecutor's charging discretion should be considered in relation to the disproportionality argument. Indeed, where a defendant's conduct arguably violates more than one criminal statute, our Supreme Court has determined that the prosecutor has discretion to decide whether to prosecute and under what statute or statutes to file charges. Skinner v. State, 736 N.E.2d 1222, 1222 (Ind.

2000). In other words, when two criminal statutes appear to "overlap," such that more than one statute appears to define the acts of a defendant, the State may prosecute under either statute so long as doing so does not discriminate against any class of defendants. Kibbey v. State, 733 N.E.2d 991, 996 (Ind. Ct. App. 2000).

As in all criminal cases, a prosecutor evaluates the nature and circumstances of the offense and the evidence supporting it when determining what charge to file against a defendant. And in these circumstances, Ervin's taking of the bicycle and later pawning it was appropriately charged as a theft, and the jury found him guilty of committing that offense. Additionally, the fact that the class D felony conviction subjected Ervin to a sentencing range of six months to three years was proportionate to the offense that he committed. For all these reasons, we conclude that the penalty for theft is not unconstitutionally disproportionate to that of class A misdemeanor conversion.

CONCLUSION

In light of our discussion above, we conclude that the pawn card and bill of sale were properly admitted under the business record exception to the hearsay rules. We also find that the trial court did not abuse its discretion when it refused to instruct the jury on conversion, a class A misdemeanor. Finally, we reject Ervin's contention that the offenses of theft and conversion are "one and the same," and conclude that the classification of theft, as a class D felony, does not violate the Proportionality Clause set forth in Article I, Section 16, of the Indiana Constitution.

The judgment of the trial court is affirmed.

VAIDIK, J., and BROWN, J., concur.