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IN THE
COURT OF APPEALS OF INDIANA

LISA FOUCE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 27A04-1011-CR-695
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Dana J. Kenworth, Judge Pro Tem
Cause No. 27D02-0903-FC-44

August 4, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Lisa Fouce ("Fouce") was convicted of Class C felony forgery and Class D felony theft in Grant Superior Court. She was ordered to serve an aggregate sentence of five years with four years suspended to probation. Fouce appeals and raises three issues, which we reorder and restate as:

> I. Whether the trial court abused its discretion when it denied Fouce's request for a continuance of trial and admitted into evidence a tape recording that was not disclosed to the defendant until the day of trial;
>
> II. Whether her forgery and theft convictions violate the prohibition against double jeopardy; and
>
> III. Whether her five-year aggregate sentence, with four years suspended to probation is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

Facts and Procedural History

In 2007, Fouce was employed as a Home Health Care Aid and Homemaker through an organization known as Faithful Friends. The purpose of the organization is to provide basic care for individuals who need assistance but desire to live independently. Fouce initially had several clients, but in 2008, she began to work exclusively for Nina and Jack Stephenson, who were elderly and in declining health.

Fouce's duties for the Stephensons included cleaning, preparing meals, running errands, purchasing groceries, and providing personal health care. Fouce also began to assist the Stephensons with paying their bills. Specifically, Fouce and Nina Stephenson would review the bills, and Fouce would then write and sign the checks with Nina's

permission. Fouce would then mail the paid bills and she maintained the Stephensons's check register.

In August 2008, the Stephensons' daughter, Jody Lawvere, was informed that Nina had bounced a check written to her beautician. Concerned for the state of her parents' finances, Jody obtained a power of attorney so that she could review their bank records. Jody discovered several checks that appeared suspicious, and upon comparing the payments to the corresponding entry in the checkbook registry, learned that the amount of the payments frequently differed from the debt recorded in the registry. Additionally, several checks recorded in the registry for lawn care and groceries were instead made payable to Fouce.

During the ensuing investigation, Fouce claimed that she was suffering financially and that Nina agreed to loan her the money, which she intended to repay. Twelve checks from the Stephensons' account were made payable to Fouce, but were listed in the check registery as funds for groceries, lawn care, or as checks that were void. Ex. Vol., State's Exs. 4-5. Three checks were cashed at the Stephensons' bank and the remaining checks were deposited into Fouce's checking account.

On March 17, 2009, the State charged Fouce with Class C felony forgery and Class D felony theft. A jury trial commenced on September 27, 2010. On that date, the State disclosed to the defense the existence of a tape recording of a message that Fouce had left on the Stephensons' son's answering machine. In the message, Fouce stated that she had saved $1000 for bond money that she wanted to repay to the Stephensons if they would agree to drop the charges. Fouce objected to the admission of the tape because the

State failed to produce it during discovery and also requested a continuance. The trial court denied Fouce's request for a continuance and admitted the tape over Fouce's objection.

The jury found Fouce guilty has charged. A sentencing hearing was held on October 25, 2010. The trial court found several aggravating circumstances: the harm or loss suffered by the victim was significant and greater than the elements necessary to prove the commission of the offense, the age of the victims, that the victims were mentally or physically infirm, Fouce was in a position of care, custody, or control over the victims and took advantage of their trust, Fouce failed to comply with police instruction to have no contact with the victims, and Fouce attempted to manipulate the victims during the investigation. The trial court also considered Fouce's lack of criminal history, that she is likely to respond to probation or short-term imprisonment, and that Fouce has made or will make restitution to the victims as mitigating circumstances.

After concluding that the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Fouce to five years with four years suspended to probation for the Class C felony forgery conviction and three years with two years suspended to probation for the Class D felony theft conviction. The court ordered the sentences to be served concurrently. Fouce now appeals. Additional facts will be provided as necessary.

I. Fouce's Request for a Continuance

Fouce argues that the trial court abused its discretion when it denied Fouce's request for a continuance due to the State's nondisclosure of the voicemail recording in

which Fouce told the Stephensons that she would have to give $1000 to the bail bondsman instead of to the Stephensons unless they dropped the charges. In response, the State argues that Fouce waived her argument, and that the trial court acted within its discretion because there was no evidence that the State had acted in bad faith or that the recording's admission prejudiced Fouce.

On the day of trial, the State informed Fouce that it intended to introduce a recording of the message she left for the Stephensons. Fouce initially objected to its admission because it was not produced during discovery. Fouce also requested a continuance. The trial court denied Fouce's request but stated that Fouce could review the recording overnight and "determine if there is anything more that needs to be done regarding that tape." Tr. p. 44. The trial court stated that the tape would not be admitted into evidence until Fouce had a chance to listen to it.

Fouce had the opportunity to review the tape during a break in trial and withdrew her objection. Tr. p. 74. But during James Stephenson's testimony, Fouce learned that James had told a former prosecutor about the recording early in the State's investigation of the case. James reminded the current prosecutor about the recording a few days before trial. Tr. pp. 112-13. Fouce then again objected to the admission of the recording and stated "if they have known about this for over a year and not produced it until the day of trial, I don't think that it should be admitted." Tr. p. 116. The trial court determined that the recording was admissible after concluding:

> I don't think that there is any evidence of bad faith or deliberate suppression of the tape on the part of the State. I also note that the only prejudice argued by the defense is that the opening statement would have

> been different, however, opening is not evidence in this case. . . . And I find that whether or not there was a discovery violation is questionable at this point because James Stephenson was listed as a witness originally with the case.

Tr. p. 136. But the trial court determined that because the State belatedly disclosed the tape to the defense, it would admit into evidence a letter Fouce's counsel sent to the prosecutor concerning Fouce's willingness to repay the Stephensons.

The proper remedy for a discovery violation is a continuance, and a trial court has broad discretion to address such violations. Berry v. State, 715 N.E.2d 864, 866 (Ind. 1999). "Exclusion of the evidence is an extreme remedy and is to be used only if the State's actions were deliberate and the conduct prevented a fair trial." Id.

The State argues that Fouce waived her request for a continuance by withdrawing her objection after she reviewed the recording. Although Fouce later renewed her objection to the admission of the recording, she did not request another continuance. Failure to request a continuance as an alternative to excluding the evidence constitutes a waiver of any alleged error pertaining to noncompliance with the court's discovery order. Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000). Fouce did not request a continuance after withdrawing her initial objection, and therefore, the issue is waived.

Waiver notwithstanding, there is no evidence in the record to suggest that the State's actions were deliberate. Instead, it simply appears that there was a lack of communication between the former prosecutor, who apparently never obtained a copy of Fouce's message, and the prosecutor who ultimately litigated this case. Also, the State's failure to produce the recording in a timely manner did not result in an unfair trial. Fouce

unsuitably categorizes the recording as "highly damaging." Fouce never denied that she owed money to the Stephensons. The question for the jury to resolve was whether she stole their money or whether the Stephensons had loaned the money to her. Fouce simply has not presented any compelling argument that would lead us to conclude that a continuance was necessary to avoid the result of an unfair trial.

II. Double Jeopardy

Fouce claims that her convictions for forgery and theft violate her right to be free from double jeopardy. The Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Double jeopardy analysis involves the dual inquiries of the statutory elements test and the actual evidence test. Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32 (Ind. 1999)).

The standard for evaluating an alleged double jeopardy violation is well-settled:

> In Richardson v. State (1999) Ind., 717 N.E.2d 32, our Supreme Court established a two-part test for analyzing double jeopardy claims under the Indiana Constitution and concluded:
>
> > "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson, supra at 49.
>
> Thus, even if there was no double jeopardy violation in the present case based upon the essential statutory elements of the crimes of forgery and theft, a violation may still have occurred if the actual evidence presented at trial demonstrates that each offense was not established by separate and distinct facts. The defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential

> elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Williams v. State, 892 N.E.2d 666, 668–69 (Ind. Ct. App. 2008) (some citations and quotations omitted), trans. denied.

To prove that Fouce committed forgery, the State was required to show beyond a reasonable doubt that Fouce, "with intent to defraud, ma[de], utter[ed], or possess[ed] a written instrument in such a manner that it purport[ed] to have been made: (1) by another person; (2) at another time; (3) with different provision; or (4) by authority of one who did not give authority." Ind. Code § 35–43–5–2(b) (2006). And to prove that she committed Class D felony theft, the State was required to show beyond a reasonable doubt that Fouce "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." I.C. § 35–43–4–2(a). Clearly, the essential statutory elements of forgery and theft do not create a double jeopardy issue. Williams, 892 N.E.2d at 669 (citing Benberry v. State, 742 N.E.2d, 532 537 (Ind. Ct. App. 2001)). We therefore consider only whether there is a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of forgery were also used to establish the essential elements of theft.

The forgery charge alleged that Fouce, "with intent to defraud, did make and/or utter a written instrument, to-wit: check(s) drawn upon the Salin Bank and Trust Company checking account of Jack Stephenson and/or Nina Stephenson; in such a manner that it purports to have been made by Nina Stepheson . . . ." Appellant's App. p. 8. Although Nina gave Fouce the authority to write and sign the Stephensons' checks to

pay their bills, she did not give Fouce the authority to write checks payable to herself. Fouce wrote numerous checks payable to herself and signed Nina's name to the checks. Fouce then deposited the checks into her checking account. This evidence supports Fouce's forgery conviction.

The theft charge alleged that Fouce "did knowingly or intentionally exert unauthorized control over U.S. cash currency belonging to Jack Stephenson and/or Nina Stephenson with the intent to deprive Jack Stephenson and/or Nina Stephenson of some part of said money's value or use[.]" Appellant's App. p. 9. The facts supporting this conviction include that Fouce presented three forged checks to Salin Bank, and then received cash for those checks. Fouce's receipt of cash for the forged checks is a separate evidentiary fact that supports her conviction for Class D felony theft. Specifically, by cashing the forged checks, Fouce knowingly exerted unauthorized control over the Stephensons' money with the intent to deprive them of the use and value of their funds.

We therefore conclude that Fouce's forgery and theft convictions were established by separate evidentiary facts, and do not violate the prohibition against double jeopardy enumerated in Article I, Section 14 of the Indiana Constitution.

III. Inappropriate Sentence

Finally, we consider whether Fouce's aggregate five-year sentence with four years suspended to probation is inappropriate in light of the nature of the offense and the character of the offender. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution

authorize independent appellate review and revision of a sentence imposed by the trial court. Alvies v. State, 905 N.E.2d 57, 64 (Ind. Ct. App. 2009) (citing Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007)). This appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Anglemyer, 868 N.E.2d at 491.

However, "we must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give 'due consideration' to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions." Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007).

Fouce was ordered to serve five years (with four years suspended) for her Class C felony forgery conviction, which is one year more than the advisory sentence for a Class C felony. See Ind. Code § 35-50-2-6 (2004 & Supp. 2011). But she was ordered to serve the maximum three year sentence (with two years suspended) for her Class D felony theft conviction. See Ind. Code § 35–50–2–7 (2004 & Supp. 2011). The trial court ordered Fouce to serve her sentences concurrently, and therefore, we consider whether Fouce's five year sentence with four years suspended to probation is inappropriate. See Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008) (stating "appellate review should focus on

the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count").

Concerning the nature of the offense, Fouce took advantage of her elderly clients need for assistance and forged numerous checks on the Stephensons' checking account. She then deposited the checks into her own account or cashed the checks stealing well over $1000 from the Stephensons. The Stephensons also incurred overdraft fees and the inability to meet their own financial obligations as a result of Fouce's offenses.

Despite her offenses against the Stephensons, even the State agrees that Fouce cared a great deal for the Stephensons and took good care of their needs. Also, Fouce has no prior criminal history and has been a productive member of society.

But Fouce's conduct during the police investigation and these proceedings does not reflect well on her character. Fouce attempted to cover up her continued theft by depositing $900 into the Stephensons' account just prior to the start of the police investigation. She also contacted the Stephensons after the investigation began despite the police's order to have no contact with them. Fouce begged the Stephensons to drop the charges against her causing emotional distress to Nina Stephenson. She also attempted to manipulate the Stephensons after the arrest warrant had been issued by telling them that she had to give the $1000 she had saved to the bondsman instead of paying restitution. Finally, the Stephensons cared for and trusted Fouce, and Fouce took significant advantage of their trust and her position of care over them.

For all of these reasons, we conclude that Fouce's aggregate five-year sentence with four years suspended to probation is not inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

Fouce waived her request for a continuance due to the State's discovery violation. Her forgery and theft convictions do not violate the prohibition against double jeopardy, and her aggregate five-year sentence with four years suspended to probation is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.