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.

FILED
Aug 06 2009, 9:04 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

STEVEN KNECHT
Vonderheide & Knecht, P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER P. TANAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A04-0902-CR-56
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0802-FB-17

August 6, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Christopher P. Tanas (Tanas), appeals his conviction for burglary, as a Class B felony, I.C. § 35-43-2-1, and the trial court's order of restitution.

We affirm in part, reverse in part, and remand for further proceedings.

ISSUES

Tanas raises two issues on review, which we restate as:

(1) Whether the State presented sufficient evidence to prove he committed burglary beyond a reasonable doubt; and

(2) Whether the trial court abused its discretion when it ordered him to pay restitution in an amount to be determined later by the White County Probation Department.

FACTS AND PROCEDURAL HISTORY

On November 23, 2007, Virgil Poppa (Poppa) returned to his home in Monticello, Indiana, and noticed that a sliding glass door was open and stereo equipment was missing. Tanas and Michael Smith (Michael) had broken into Poppa's home to steal the equipment so that Tanas could pay off a debt he owed someone in Hammond. Tanas had removed a window air conditioner, climbed through the open window, and let Michael into to the home. They proceeded to carry out speakers and receivers from Poppa's home, loading their car until it was full.

Shortly after the burglary, Michael told his younger brother, Jeff Smith (Jeff), about the heist, and Jeff then told the story to someone else. Eventually, the story had spread throughout the community and reached Detective Patrick Shafer of the White County

Sheriff's Department (Detective Shafer) about three months after the burglary. Detective Shafer went to the Smiths' home and spoke with their mother. Neither Michael nor Jeff was home at the time; so, Detective Shafer made an appointment for Jeff and Michael to come to his office the next day with their father, who was also named Jeff Smith (Father). The next day, Father brought his sons to Detective Shafer's office, and Detective Shafer first spoke with Father alone. He then spoke with Father and Jeff together, and Jeff implicated Michael and Tanas. Detective Shafer interviewed Michael next, with Father remaining in the room. Michael implicated Tanas, and initially attempted to minimize his role in the burglary, but opened up after a few minutes and admitted that he entered Poppa's home and carried out stereo equipment with Tanas.

Detective Shafer contacted Tanas, but Tanas denied any involvement in the burglary. Detective Shafer approached Michael with a plan to have Michael call Tanas and record the call. Michael agreed to participate. Michael called Tanas and had a conversation with him, which was recorded without Tanas' knowledge. Fifty seconds into the conversation, Michael told Tanas: "I heard you were snitchin' on me dude and that's bull shit." (Transcript p. 124). Tanas replied: "I'll take it to the [] grave. For some reason, uh, the cops seem to think that all the merchandise got sent north to cover a debt." (Tr. p. 124). Three minutes and twenty-nine seconds into the taped conversation, Michael stated: "Well, are they gonna be able to track us on this [], dude?" (Tr. p. 125). Tanas responded to this question by stating: "No, [] no, bro. 'Cause it's not - it wasn't even us, right - nothing happened. I'd rather just call you on another phone or see you in person, but - [] Shafer's got my number." (Tr. p. 125). Five

minutes and thirteen seconds into the conversation, Michael stated: "Hey dude, Shafer's also tellin' me that you're saying we did a lot more places . . . ." (Tr. p. 126). Tanas responded by saying:

> No, dude. Honestly bro don't believe anything [] that pig says. He's gonna – the problem is he don't having [sic] nothin' on us. That's the reason why both of us walked out of there. Why he gave us the option to go with him or our parents, because he had nothin' on us. He's gonna try to make us incriminate ourselves or incriminate each other. As long as we don't, dude, their case is [] cold.

(Tr. p. 126). Shortly thereafter, Smith said: "I know, dude, we need to stick together." (Tr. p. 127). Tanas replied: "Well, shit. Make sure our mouths are shut, bro. Mine is closed, it ain't openin', I don't care." (Tr. p. 127). And Tanas stated moments later, "So . . . keep your mouth shut, I'll keep mine, and at the end we can sit back and laugh on it and [] we'll get [] old dude." (Tr. pp. 127-28).

On February 26, 2008, the State filed an Information charging Tanas with burglary, as a Class B felony, I.C. § 35-43-2-1. On November 18 and 19, 2008, the trial court conducted a jury trial of Tanas. The jury found Tanas guilty as charged. The trial court held a sentencing hearing on January 12, 2009. The trial court sentenced Tanas to ten years in the Department of Correction with four of those years suspended to probation. Additionally, the trial court ordered Tanas to make restitution to Poppa "for the loss sustained as a result of this crime, jointly and severally with any other co-defendants convicted of the offense." (Tr. p. 200). The trial court did not determine the amount of the restitution, but rather "allow[ed

for] probation to supplement the pre-sentence report with a restitution claim . . . by the victim." (Tr. p. 201).

Tanas now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Tanas contends that the evidence presented by the State did not prove beyond a reasonable doubt that he committed burglary, as a Class B felony. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-213 (Ind. Ct. App. 2007), *trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

Tanas contends that there is insufficient evidence because the testimony of Michael is incredibly dubious. Under the "incredible dubiosity rule," we will impinge upon the jury's responsibility to judge the credibility of the witnesses only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994). "When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed." *Newson v. State*, 721 N.E.2d 237, 240 (Ind. 1999).

The application of this rule is limited to cases where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. *Id*.

Tanas contends that Michael's testimony is incredibly dubious because he admitted that he told lies to Detective Shafer when he initially implicated himself and Tanas. However, a witness's trial testimony that contradicts that witness's earlier statements does not make such testimony incredibly dubious. *Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001). Tanas has failed to direct our attention to any inherently improbable or equivocal testimony from Michael at trial.

Furthermore, Michael's testimony is corroborated by Tanas's statements made during the recorded phone call. Tanas argues that the inference from the recording is that he "did not intend to reveal his knowledge of Michael's involvement." (Appellant's Brief p. 21). We acknowledge the possibility that such an inference could be developed from some of Tanas's statements. But, that is not the only inference that could be made from Tanas's statements. During the recording, Tanas used plural pronouns several times: "he don't having [sic] nothin' on us"; "[h]e's gonna try to make us incriminate ourselves or incriminate each other"; "at the end we can sit back and laugh on it and [] we'll get [] old dude." (Tr. pp. 126-28). These statements support an inference that Tanas participated in the burglary along with Michael, thereby corroborating Michael's testimony. Altogether, we conclude that the rule of incredible dubiosity does not apply to Michael's testimony and the evidence presented by the State sufficiently proved beyond a reasonable doubt that Tanas burgled Poppa's home.

II. *Restitution*

Tanas contends that the trial court abused its discretion relating to restitution in two ways: (1) it ordered restitution although no evidence was presented as to the amount of the victim's loss; and (2) it ordered restitution without setting an amount to be paid, or manner in which it is to be paid. The State responds by arguing that Tanas has waived this issue for review by failing to lodge an appropriate objection to the trial court.

Relevant to the trial court's restitution order, Indiana Code section 35-50-5-3 lays out the requirements for a restitution order, by providing:

> (a) Except as provided in subsection (i) or (j), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime . . . . The court shall base its restitution upon a consideration of:
>
> > (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate).

Furthermore, since the trial court ordered Tanas to make restitution as a part of its order for probation, the trial court was required to "fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance." I.C. § 35-38-2-2.3. "Generally, an order of restitution is within the trial court's discretion, and it will be reversed only upon a finding of an abuse of that discretion. An abuse of discretion occurs when the trial court misinterprets or misapplies the law." *Green v. State*, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004). However, to the extent that the determination of this issue rests

upon statutory interpretation, our review is *de novo*. *See Ashley v. State*, 757 N.E.2d 1037, 1039 (Ind. Ct. App. 2001).

Addressing the State's contention of waiver, we note that in *Mitchell v. State*, 730 N.E.2d 197, 201 (Ind. Ct. App. 2000), we determined that the trial court had erred by rendering what was essentially a conditional restitution order, but concluded that Mitchell had waived review of this error by failing to object to the trial court. We relied upon the general proposition that: "When a defendant does not properly bring an objection to the trial court's attention so that the trial court may rule upon it at the appropriate time, he is deemed to have waived that possible error." *Id*. (quoting *Brown v. State*, 587 N.E.2d 693, 703 (Ind. Ct. App. 1992)). However, more recently in *Green*, 811 N.E.2d at 877, we considered an appeal from a restitution order in spite of an absence of objection before the trial court. We explained that the contention on appeal was that the trial court had exceeded its statutory authority, and, further noted that the trial court had ordered restitution as a part of Green's sentence. *Id*. Therefore, we concluded that we should treat the question "like any other claim that a trial court has violated its statutory authority in imposing [a] sentence, which amounts to fundamental error, and which may be raised for the first time on appeal." *Id*.

Here, Tanas claims that the trial court violated Indiana Code sections 35-50-5-3 and 35-38-2-2.3 when making the restitution order. Therefore, we conclude that, much like Green, Tanas claims that the trial court violated its sentencing authority and the issue is properly before us on appeal despite the fact that he failed to object to the trial court.

Moving on to the merits of Tanas' contentions, we note that the restitution order was for Poppa's loss of the stereo equipment. Thus, the restitution order stems from Indiana Code section 35-50-5-3(a)(1), and the trial court was therefore required to make its order based upon a consideration of the "actual cost" of replacement of Poppa's stereo equipment since it was never recovered. However, the trial court ordered restitution without any evidence of what the actual cost would be to replace Poppa's stolen equipment. And, as we noted above, the trial court ordered restitution as a condition of probation, but did not fix the amount of the restitution in accordance with Indiana Code section 35-38-2-2.3(a)(5). Rather, the trial court left for the probation department the task of determining of the amount of restitution. For both of these reasons, we conclude that the trial court abused its discretion when ordering restitution, and remand for the trial court to hold a hearing to fix the amount of restitution in accordance with Indiana Code sections 35-50-5-3(a)(1) and 35-38-2-2.3(a)(5).

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Tanas committed burglary, as a Class B felony, but the trial court abused its discretion when ordering restitution.

Affirmed in part, reversed in part, and remanded with instructions.

KIRSCH, J., and MATHIAS, J., concur.