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IN THE
COURT OF APPEALS OF INDIANA

DENNIS ELLIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A04-0812-CR-711
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane S. Craney, Judge
Cause No. 55D03-0804-FD-124

August 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dennis Ellis appeals his conviction and sentence for theft, a class D felony.[1]

We affirm.

ISSUES

1. Whether there is sufficient evidence to support Ellis' conviction for theft.

2. Whether the trial court abused its discretion in sentencing Ellis and whether Ellis' sentence was inappropriate in light of the nature of the offense and the character of the offender.

FACTS

On April 28, 2008, Dennis Ellis collected pieces of metal from along the railroad tracks in Martinsville, Indiana, and placed them in the bed of his pick-up truck. Two railroad employees witnessed Ellis collecting the metal and approached him. They informed Ellis that the scrap metal along the railroad belonged to the Indiana Southern Railroad, and that he was not allowed to collect it for his own profit.

The employees telephoned their supervisor, who then called the police. At the railroad workers' request, Ellis removed the pieces of scrap metal from the bed of his truck, placed them back on the ground, and waited for the police. When the police arrived, the employees reported that they had witnessed Ellis collecting the railroad's metal and placing it in his truck, and one employee stated that he saw Ellis pry metal

[1] Ind. Code § 35-43-4-2(a).

spikes from the railroad tracks. Ellis was then arrested and charged with class D felony theft and class A misdemeanor criminal mischief.[2]

On October 8, 2008, a jury found Ellis guilty of theft, and not guilty of criminal mischief. The trial court ordered a pre-sentence investigation ("PSI") and held a sentencing hearing on November 6, 2008. According to the PSI, Ellis had several previous convictions, including a class A misdemeanor sexual battery in 1995, three class A misdemeanor convictions for check deception between 1998 and 2003, as well as a class D felony probation violation in 2006 for failure to register as a sex offender. The trial court imposed the advisory sentence of one and one-half year for class D felony theft.

DECISION

I. Sufficiency of the Evidence

Ellis first contends that the State failed to provide sufficient evidence to support his conviction for theft. We disagree.

When reviewing the sufficiency of evidence to support a conviction, we neither reweigh evidence nor assess witness credibility. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Instead, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. *Id.* We will defer to the trial court's findings of fact, and we will affirm unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.*

[2] I.C. § 35-43-1-2(a)(1)(A)(i).

Indiana Code section 35-43-4-2(a) provides that "[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." On appeal, Ellis challenges the sufficiency of the State's evidence to establish (1) that he acted with the requisite intent; and (2) that the metal was of value or use to the railroad.

A. Intent

"Intent is a mental function and without a confession, it must be determined from a consideration of the conduct and natural consequences of the conduct." *Duren v. State*, 720 N.E.2d 1198, 1202 (Ind. App. 1999). The jury may infer intent from circumstantial evidence, including, "a defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points." *Id.*

Two railroad employees testified that Ellis gathered metal from alongside the railroad track and removed spikes from the railroad tracks. From the employees' testimony about Ellis' actions, along with his admission that he did not have permission to remove the metal for his own use and profit, the jury could have made the reasonable inference that Ellis intended to exert unauthorized control of the railroad's property and deprive the railroad of its value. By urging us to reconsider the issue of intent placed before the jury, Ellis is asking us to reweigh trial evidence, which we will not do. *Drane*, 867 N.E.2d at 146. The jury could have reasonably inferred from the evidence that Ellis acted with the requisite criminal intent, and we will defer to its findings. *Id.*

B. Deprivation of Value or Use

Ellis contends that "[a]n acquittal on the [c]riminal [m]ischief charge … can only mean that no deprivation took place here." Ellis' Br. at 12. We disagree. Ellis would be guilty of criminal mischief if he "recklessly, knowingly, or intentionally damage[d] or deface[d] the property of another without the other person's consent" and "the pecuniary loss [was] at least two hundred and fifty dollars ($250) but less than two thousand five hundred dollars ($2,500). I.C. § 35-43-1-2(a)(1)(A)(i).

The resolution of the criminal mischief charge has no bearing upon whether Ellis exerted unauthorized control over property of value to the railroad. The jury could still have found that the metal Ellis collected alongside the railroad tracks had value and that he intended to deprive the railroad of its value, without having to find that he recklessly, knowingly, or intentionally damaged or defaced the railroad's property.

Ellis argues that the metal he collected lacked worth because the railroad had no current use for the scrap materials. His argument must fail since the railroad need not demonstrate the use of its property in order to suffer the deprivation of it. *See Morgan v. State*, 440 N.E.2d 1087, 1090 (Ind. 1982) (sustaining a conviction for theft of aluminum window frames taken from a burned house). Furthermore, in presenting the testimony of a railroad employee that the railroad sometimes received a monetary return by scrapping its own metal, the State provided sufficient evidence to allow the jury to reasonably conclude that the metal did have value to the railroad.

Considering the evidence provided to the jury and the reasonable inferences that evidence would allow, we cannot say that "no reasonable fact-finder could find the

elements of the crime proven beyond a reasonable doubt." *Drane*, 867 N.E.2d at 146. Therefore, we find that the State did provide sufficient evidence to support Ellis' theft conviction.

II. Sentence

Next, Ellis contends that the trial court abused its discretion by considering an improper aggravating circumstance. He further contends that the sentence is inappropriate considering his character and the nature of his offense.

A. Abuse of Discretion

Sentencing decisions are within the sound discretion of the court. *Anglemyer v. State*, 868 N.E.2d 489, 490 (Ind. 2007). As long as the sentence falls within the statutory range, it is subject to appellate review only for abuse of discretion. *Id.* "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id.* at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

Indiana Code section 35-38-1-1.3 requires that trial courts issue sentencing statements for felony offenses, providing reasons for the sentences given and citing any mitigating or aggravating factors it considered. However, Indiana Code section 35-38-1-7.1 allows trial courts to impose sentences above or below the advisory sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." I.C. § 35-38-1-7.1.

A reviewing court may find that a trial court has abused its discretion if it fails to include a sentencing statement, or if it "explains reasons for imposing a sentence – including the finding of aggravating and mitigating factors if any – but the record does not support the reasons, … or the reasons given are improper as a matter of law." *Anglemyer*, 868 N.E.2d at 490-91. The relative weight ascribed to each of the factors is not subject to appellate review for abuse of discretion. *Id*. at 491.

In his brief, Ellis quotes the following statements made by the trial court prior to the actual sentencing statement.

> DEFENSE COUNSEL: "… he was found not guilty of any damage to the tracks and … actually one witness contradicted the other witness on what he was doing with it.
>
> THE COURT: "That's not how I recall it, other than they described what was being used to pry was different."

(Tr. 214-15). Ellis contends that the above exchange is indicative of the court's consideration of an improper aggravator. It appears, however, that the court's remarks were made to immediately address defense counsel's inaccurate recollection of the record, not to explain its subsequently-imposed sentence. The issue of damage caused to the track was not mentioned later when the court specified the mitigating and aggravating circumstances it considered in reaching its decision.

> THE COURT: The Court has read and considered the Presentence Investigation. As far as mitigating circumstances, the Defendant does have a dependent or … or at least a semi-dependent who would suffer from his incarceration. As far as aggravating circumstances, he does have a criminal history, and he has violated conditions of probation, parole, (inaudible), and he was on probation at the time of the offense.

(Tr. 216). Based on the trial court's sentencing statement, no abuse of discretion occurred here. The mitigating and aggravating circumstances listed in the statement are all supported by the record; further, given Ellis' criminal history, previous probation violation, and probationary status at the time of this offense, we cannot say that the trial court's decision is "clearly against the logic and effect of the facts and circumstances."[3] *Anglemyer*, 868 N.E.2d at 490. Rather, we find that the trial court acted well within its discretion by ordering Ellis to serve the advisory sentence for theft.

B. Inappropriateness

On appeal, Ellis also invokes Appellate Rule 7(B) to argue that his sentence should be reduced. Even when a trial court has acted within its lawful discretion in determining a sentence, an appellate court may independently revise a sentence if, after due consideration, the appellate court finds the sentence "inappropriate in light of the nature of the offense and the character of the offender." App. Rule 7(B). The burden lies on the defendant to "persuade the court that his or her sentence has met this inappropriateness standard of review. *Childress v. State*, 848 N.E.2d 1072, 1081 (Ind. 2006).

Ellis has not carried that burden here. In *Childress*, the Indiana Supreme Court stated that "regarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id.* In his brief, Ellis attempts to minimize the seriousness of his offense by stating that, "[t]he

[3] As the State rightly points out in its brief, with these three aggravating factors present, the trial court would likely have been justified in imposing a sentence *above* the advisory length.

actual harm to the railroad was, at most, negligible, since the railroad had no use for the items taken, nor even desired to sell them for scrap value." Ellis' Br. at 15-16. However, as we stated earlier when discussing sufficiency of evidence, any argument that the railroad's lack of appreciation of the metal's worth somehow negates its value is meritless.

Ellis also fails to demonstrate how his character compels a revision of his sentence. His criminal history includes multiple convictions for check deception, a class A misdemeanor conviction for sexual battery, and a class D felony conviction for probation violation due to his failure to register as a sex offender. Although Ellis cites his remorse and caretaking of his son as evidence of his character, we are not persuaded that these two factors merit a reduction of his sentence below the advisory sentence imposed herein.

Affirmed.

ROBB, J., and MATHIAS, J., concur.