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IN THE
COURT OF APPEALS OF INDIANA

MARC VAN ROWLAND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1010-CR-1161
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0906-FC-50

August 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Marc Van Rowland ("Rowland") appeals his convictions for Attempted Burglary, as a Class C felony,[1] and Resisting Law Enforcement, as a Class A misdemeanor,[2] and an attendant adjudication that he is a habitual offender.

We affirm.

Issues

Rowland presents several issues for our review, which we restate as:

I. Whether admission of Rowland's post-Miranda statement to police was fundamental error requiring reversal of his Attempted Burglary conviction;

II. Whether there was sufficient evidence to support Rowland's conviction for Attempted Burglary; and

III. Whether his sentence is inappropriate and should be revised downward pursuant to Appellate Rule 7(B).

Facts and Procedural History

In the early morning hours of June 17, 2009, Alex Hwang ("Alex") was spending the night alone in his family's comic book store in a strip mall in Lafayette, where he sometimes slept because of its proximity to the college he attended. Around 1:45 a.m., Alex heard voices, sawing, and metallic banging noises coming from behind the family business. Worried that someone might be breaking into the store, Alex called his mother, Rose Hwang ("Rose"), waking her from sleep. Rose reminded Alex that a new tenant had moved into the

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[1] Ind. Code § 35-41-5-1 & 35-43-2-1.
[2] I.C. § 35-44-3-3.

space next to the Hwangs' store and had been doing construction work.

A couple of minutes later, Alex heard cans rattling immediately behind the Hwangs' store. The Hwangs kept bags of cans behind their store for recycling, and Alex thought perhaps garbage was being hauled away. More concerned than before, however, he again called Rose.

Soon afterward, Alex heard the sound of a zipper being pulled and Velcro being separated, and heard men speaking to one another. One voice asked, "is there a door alarm?" (Tr. 33.) Another stated in response, "I don't think there is." (Tr. 33.) Another voice asked, "is this all we found in this closet area[?]" (Tr. 33.) Alex again called Rose; Rose told Alex that she was on her way to the business. Rose and her father[3] got in a car and began to drive to the store, and called 911 en route. During a final phone call, Rose instructed Alex to leave the store; Alex left through the front door and remained at the front of the building. Rose and her father reached the business soon after, eventually parking across the street to await police.

At around 2:20 a.m., Officers Charles Williams ("Officer Williams") and Jeff Tislow ("Officer Tislow") of the Lafayette Police Department arrived on the scene. Coming to the northwest corner of the building, the officers peeked around it. Rowland peeked back, looking directly at Officer Williams; as the officers came fully around the corner, Rowland began to run away. Officer Williams led the foot chase, identifying himself as a police officer, repeatedly instructing Rowland to stop, and radioing dispatch regarding the pursuit.

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[3] Rose's father, who passed away before this matter went to trial, goes unnamed in the record.

After a brief chase, Rowland reached an open area to the north of the shopping center, lay down on the ground, and began to comply with the officers' instructions. While being taken into custody, Rowland stated, without prompting from Officers Williams and Tislow, that he "wasn't breaking into anything." (Tr. 71.) Another officer, Steven Prothero ("Officer Prothero"), placed Rowland into a squad car and read the Miranda advisements to him. Rowland stated that he waived his right to counsel and upon questioning by Officer Prothero repeated his assertion that he had no knowledge of any attempt to break into the store.

After Rowland's arrest, police officers began to assess the scene. Despite Rowland's insistence that there was no one with him, the officers on-scene attempted to locate other individuals who might have been involved in the burglary attempt. Officer Prothero and another officer searched the Hwangs' store, but no one was discovered there, and a search through the store using a Tippecanoe County Sheriff's Department canine also turned up no additional persons.

Upon arresting Rowland, however, Officer Williams had discovered a small walkie-talkie in Rowland's left front pants pocket. Officer Williams and two other officers later used this radio to attempt to contact a possible accomplice. Without identifying himself as a police officer, Officer Williams asked the unknown individual where he was. After telling Officer Williams to "stay quiet" and that he was "walking north up the street," the individual asked, "who is this?" and was not heard from again. (Tr. 79-80.) An on-foot search for this individual, again involving use of the Sheriff's Department canine, was ultimately unsuccessful.

During Rowland's attempt to enter the Hwangs' business, the back door to the shop had been sawed nearly in half. A hole had also been cut into the exterior wall of the store's storage alcove, in which the Hwangs kept packing peanuts and camping supplies. The back door of the Hwangs' store, as well as several other businesses in the shopping center, had small indentations in the metal of the rear door of each business that were not present the prior day.

The back door of the Hwangs' business was filled with foam insulation, and the sawing had fragmented and scattered the insulation on the ground around the door. While placing Rowland into a squad car, Officer Prothero noticed that there were white flecks that looked like the door's insulation on one of Rowland's hands. Lacking tape or any other material with which to preserve the white flecks, Officer Prothero took photographs of Rowland's hands and body for later use as evidence.

A saw and black tactical vest with a zipper and Velcro straps were retrieved near a line of woods just behind the Hwangs' business. Officer Prothero noticed flecks of insulation on the saw. Later inspection of the items recovered and the photographs Officer Prothero took revealed more white flecks and powder on Rowland's pants and on the black vest recovered from the scene. Also found at the scene or in the black tactical vest were a window punch, compressed air cartridges, a compass, a set of cold chisels, binoculars, caltrops, a pocket knife, and a pry bar. The Hwangs reported no property missing from their store.

On June 24, 2009, the State charged Rowland with Attempted Burglary and Resisting

Law Enforcement. A jury trial was conducted on September 3, 2010. During the trial, Rowland waived jury trial on the State's habitual offender allegation. At the trial's conclusion, Rowland was found guilty of Attempted Burglary and Resisting Law Enforcement. On September 9, 2010, the trial court adjudicated Rowland a habitual offender.

On October 20, 2010, a sentencing hearing was conducted during which letters and testimony favoring Rowland were considered, as well as letters regarding the impact of the break-in upon Alex, Rose, and her father. At the conclusion of the sentencing hearing, the trial court entered judgment against Rowland and sentenced him to seven years imprisonment for Attempted Burglary and one year imprisonment for Resisting Law enforcement to run concurrent with the sentence for Attempted Burglary. Having already adjudicated Rowland a habitual offender, the trial court enhanced his Attempted Burglary sentence by eight years, yielding an aggregate sentence of fifteen years. The trial court ordered eleven years of the sentence executed at the Department of Correction and suspended the remaining four years to supervised probation.

This appeal ensued.

Discussion and Decision

Whether the Trial Court Committed Fundamental Error in Admitting Rowland's Post-Miranda Statement to Police

Rowland seeks reversal of his conviction for Attempted Burglary on two grounds, asserting that there was insufficient evidence to support the conviction and that, even if there

was sufficient evidence, the trial court committed fundamental error requiring reversal of the conviction when it admitted into evidence his post-Miranda statement to Officer Prothero. We address the question of fundamental error first.

Rowland argues that the State failed to prove beyond a reasonable doubt that his post-Miranda statement to Officer Prothero, during which he consistently and repeatedly denied any involvement in the break-in and insisted that he was out for a walk, was a voluntarily given confession of guilt under the Indiana Constitution.

We first observe that Rowland failed to object at trial to the introduction of his recorded statement to Officer Prothero. Having otherwise waived our review, Rowland is entitled to reversal of his conviction only if the trial court's admission into evidence of his statement is fundamental error. Brabandt v. State, 797 N.E.2d 855, 860 (Ind. Ct. App. 2003).

> Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes "a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process … present[ing] an undeniable and substantial potential for harm." Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002).

Cooper v. State, 854 N.E.2d 831, 836 (Ind. 2006).

Article 1, Section 14 of the Indiana Constitution states that "[n]o person, in any criminal prosecution, shall be compelled to testify against himself." Similar to the rights afforded defendants under the Fifth Amendment of the United States Constitution, see Miranda v. Arizona, 384 U.S. 436 (1966), this provision establishes a defendant's "right not to be forced to speak," but that confessions obtained from a defendant may be used against him "after appropriate warnings and waivers." Ajabu v. State, 693 N.E.2d 921, 930 (Ind.

1998). Under the Indiana Constitution, the State must prove beyond a reasonable doubt that any confession obtained was "given voluntarily" under the "'totality of the circumstances,' including any element of police coercion; the length, location, and continuity of the interrogation; and the maturity, education, physical condition, and mental health of the defendant." Wilkes v. State, 917 N.E.2d 675, 680 (Ind. 2009) (quoting Miller v. State, 770 N.E.2d 763, 767 (Ind. 2002)), cert. denied, 131 S. Ct. 414 (2010). For a statement to have been given voluntarily, "the court must conclude that inducement, threats, violence, or other improper influences did not overcome the defendant's free will." Id. (citing Clark v. State, 808 N.E.2d 1183, 1191 (Ind. 2004)).

We review a trial court's determination of voluntariness as we do with other sufficiency matters. We do not reweigh evidence and affirm the trial court's finding if it is supported by substantial evidence. Id. Where the State fails to prove that the defendant's confession was voluntary under this standard, "[t]he admission into evidence of an involuntary confession constitutes fundamental error and requires a reversal of the defendant's conviction." Hastings v. State, 560 N.E.2d 664, 670 (Ind. Ct. App. 1990), trans. denied. Though a conviction may be reversed under these circumstances, however, a retrial is permissible unless there is insufficient evidence to support the conviction without the inadmissible confession. Id.

Here, we cannot agree with Rowland that the bulk of his statement to Officer Prothero constituted a confession, let alone that his statement was not voluntarily given. After being read his Miranda rights and verbally waiving them, Rowland consistently denied guilt or

even knowledge that a burglary may have occurred. When asked what happened, Rowland said:

> I came from State Street, walked all the way down through here and I was out, I was walkin' in front of here and then, and then I, I walked, you know, walked back behind there, came out to in front of it, was walking that way … back around the building … I did not do s---. I just walked through here. That's what I do.

(Ex. 44a at 1-2.) Rowland explained the walkie-talkie Officer Williams found on him as "[t]hat was nobody…. I honestly don't have anybody on there…. I just, you know, 'cause sometimes I can pick up people talkin' on it." (Ex. 44a at 2.) When asked whether he saw the door that had been sawed in half, he said, "I didn't notice. I didn't, I didn't do nothin' to that." (Ex. 44a at 3.) Both before and after Officer Prothero told him about the presence of someone in the store and the presence of white foam insulation, Rowland's explanation for the white flecks on his hands was that he picked up the material "from layin' on the … ground." (Ex. 44a at 3.) Rowland denied having a vest, weapons, drugs, or compressed air cartridges. Thus, to the extent Rowland insists that his denials of culpability were in fact confessions used against him at trial, we disagree.

The only portion of Rowland's statement that colorably constitutes any form of confession is his explanation for running from Officers Williams and Tislow. Rowland told Officer Prothero that "I seen the police and I was like what the f---. So I, I ran. Just like anybody else would. But I really shouldn't have ran [sic] because I didn't have anything. I didn't do anything." (Ex. 44a at 3.) He further explained that he panicked and fled, and could not remember whether either of the officers identified themselves as police or told him

to stop. Though Rowland told Officer Prothero he remembered hearing someone yell, he indicated that he did not know who that person was or what was said.

To the extent that any of this might constitute a confession, we cannot agree that Rowland's statements are an involuntary confession as contemplated by our state's Constitution. The State introduced the entirety of Rowland's statement, which included an audio recording and written transcription of Officer Prothero's recitation of the Miranda warnings and Rowland's answer of "Yeah" when Officer Prothero asked, "Are you willing to speak with me right now without an attorney present?" (Ex. 44a at 1.)

On cross-examination of Officer Prothero, Rowland sought to elicit testimony that could establish some of the hallmarks of an involuntary confession: "inducement, threats, violence, or other improper influences" that might "overcome the defendant's free will." Wilkes, 917 N.E.2d at 680. Officers Williams and Tislow both testified that Rowland voluntarily ceased his flight. In his statement, Rowland stated directly to Officer Prothero that he neither possessed nor was using drugs at the time of his arrest. Neither the recording of Rowland's statement nor the transcript reveals that Officer Prothero threatened or otherwise attempted to influence Rowland's statements. And, again, Rowland's statement to Officer Prothero is almost entirely a denial of criminal culpability.

Thus, to the extent any of his statement was confessional in nature, we cannot agree with Rowland that the State failed to prove beyond a reasonable doubt that his post-Miranda statements to Officer Prothero were involuntary. Rowland's argument regarding the combination of the circumstances of his arrest and the setting of his interrogation constitute a

request that we reweigh the facts before the trial court when it admitted the confession into evidence. This we cannot do. See Wilkes, 917 N.E.2d at 680. The trial court did not commit fundamental error when it admitted Rowland's statement to Officer Prothero into evidence.

Whether there was Sufficient Evidence to Support Rowland's Conviction for Attempted Burglary

We turn now to Rowland's contention that there was insufficient evidence to support his conviction for attempted burglary. Our standard of review in such cases is well-settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

In order to convict Rowland of Attempted Burglary, as a Class C felony, the State was required to prove beyond a reasonable doubt that on or about June 17, 2009, Rowland attempted to enter the Hwangs' store with the intent to commit a felony, namely theft, in it by knowingly or intentionally engaging in conduct that constituted a substantial step toward commission of the offense of burglary by, with another individual, using a handsaw to cut

through the door to the Hwangs' business and to saw a hole into the business's storage alcove. I.C. §§ 35-41-5-1 & 35-43-2-1; App. 28. Rowland contends that the State failed to carry its burden on two bases: that there was insufficient evidence that he intended to commit a theft in the Hwangs' business, and that there was insufficient evidence that it was Rowland who took a substantial step toward burglarizing the business or aided and abetted another in doing so. We address each of these arguments in turn.

"To establish the intent to commit a felony element of a burglary charge, the State must prove beyond a reasonable doubt the defendant's intent to commit a felony specified in the charge." Freshwater v. State, 853 N.E.2d 941, 942 (Ind. 2006). Absent proof of intent, "criminal trespass is the appropriate charge." Id. (quoting Justice v. State, 530 N.E.2d 295, 296 (Ind. 1988)). Intent to commit a felony within a structure may be inferred, but proof of breaking and entering or flight alone is not sufficient. Id. at 943 (quoting Justice, 530 N.E.2d at 297). Rather, "in order to sustain a burglary charge, the State must prove a specific fact that provides a solid basis to support a reasonable inference that the defendant had the specific intent to commit a felony." Id. at 944. But such evidence "does not need to be insurmountable." Justice, 530 N.E.2d at 297. Moreover, "[a] person who knowingly or intentionally aids, induces or causes another person to commit an offense commits" that same offense, even where the other individual goes unprosecuted, unconvicted, or is acquitted. I.C. § 35-41-2-4.

Addressing the State's primary evidence of an intent to commit theft, the statement overheard by Alex, "Is this all we found in the closet area" (Tr. 33), Rowland argues that it is

not a specific fact "strongly collaborative" of an intent to commit theft. Justice, 530 N.E.2d at 297. We disagree. The evidence here is unlike that in the cases upon which Rowland relies because the jury determined that Rowland attempted or aided and abetted an attempt to enter the Hwangs' business, during which one of the participants made a statement regarding items located in the store. Given the presence of relatively low-value items in the storage alcove, the hole cut in the alcove wall, and the continued sawing noises after Alex overheard the statement, the statement provides sufficient evidence of an intent to enter the store for the purpose of theft once inside. This is so even if Rowland himself did not say "Is this all we found in this closet area," as he was charged with Attempted Burglary for taking a substantial step or aiding and abetting another in doing so. Thus, the statement Alex overheard was sufficient evidence of intent to commit theft as required under Indiana Code section 35-43-2-1.

We turn now to Rowland's second contention, that there was insufficient evidence to prove beyond a reasonable doubt that he was involved in the attempted burglary. Specifically, Rowland contends that the State did not produce sufficient evidence that he either attempted to enter the Hwangs' store or aided and abetted another individual who made the attempt.

The State produced ample evidence of Rowland's involvement with an attempt to enter the Hwangs' shop. Officers Williams and Prothero both testified that the back door to the business had been sawed nearly in two and that white flakes of foam insulation had been released from the door as a result. The State introduced photographic evidence corroborating

the officers' accounts. Officer Tislow testified that he located the vest and saw, and each was discovered to have similar white flakes on their surfaces. Officer Prothero testified that his examination of Rowland's hands revealed white flecks similar to the insulation, and a photograph of Rowland in a police car disclosed white flecks on his pants. This is sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that Rowland either himself sawed the door or that he was present and aided in another individual's sawing of the door.

Rowland makes much of the failure of fingerprint and DNA evidence to tie him to the various items recovered by police or to the building itself, and points to his denials of involvement upon arrest and after being read his Miranda rights. His arguments constitute an invitation for this court to reweigh the evidence; as before, we cannot do so. See Drane, 867 N.E.2d at 146. We therefore conclude that there was sufficient evidence of both Rowland's intent to commit theft upon entry into the Hwangs' store and of his taking or aiding and abetting in taking a substantial step toward burglarizing the store.

Whether Rowland's Sentence is Appropriate under Appellate Rule 7(B)

Rowland's final challenge is to the length of his sentence. Rowland's conviction of Attempted Burglary, as a Class C felony, carries a sentencing range of two years to eight years, with an advisory sentence of four years. I.C. § 30-50-2-6(a). Upon adjudication as a habitual offender, Rowland's sentence for Attempted Burglary was subject to enhancement by at least the advisory sentence for that underlying offense and by as much as three times the advisory sentence, establishing a sentence enhancement range of four to twelve years. I.C. §

35-50-2-8(h). His conviction for Resisting Law Enforcement, as a Class A misdemeanor, carries a prison term of not more than one year. I.C. § 35-50-3-2.

Here, Rowland was sentenced to seven years imprisonment for Attempted Burglary (above the advisory and one year below the maximum) with an eight year enhancement as a result of his habitual offender status, and a year of imprisonment for Resisting Law Enforcement, which represents the statutory maximum sentence for that offense. He now requests that we reduce his sentence for Attempted Burglary to six years and his enhancement as a habitual offender to four years, with the one year sentence for Resisting Law Enforcement to run concurrent with the Attempted Burglary sentence.

"So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 290 (Ind. 2007), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007). This includes the finding of an aggravating circumstance and the omission of finding proffered mitigating circumstances. Id. at 490-91. When imposing a sentence for a felony, the trial court must enter "a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence." Id. at 491.

Here, Rowland argues that the trial court gave improper consideration to certain aggravating and mitigating circumstances. Yet the court's attention to requests from the Hwangs for an aggravated sentence took into consideration their statements about the impact of Rowland's offense on their sense of security. And while Rowland argues that the trial court improperly disregarded his therapy as a mitigator, the trial court's sentencing statement

addressed this proffered mitigator and balanced his therapy against his failure to seek the same for over twenty years. In short, Rowland's argument seeks that we reweigh the sentencing factors; we decline to do so.

Thus, we apply the standard of review under Appellate Rule 7(B) to Rowland's sentence. Under that rule, this "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." When applying Rule 7(B), we assess "the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). It is the defendant's burden to persuade this court that his sentence "has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Though we find nothing remarkable in Rowland's resistance to law enforcement, Rowland's Attempted Burglary offense here goes somewhat beyond the pale of the underlying statute. He attempted twice to break into the Hwangs' store, doing considerable damage to a wall and a door in the process, and appears to have assessed the possibility of entry into other stores nearby, as evidenced by the punch marks on other businesses' rear doors. The second attempt was evidently due to dissatisfaction with what he and his unnamed companion found upon their first attempt at entry. Alex, who was in the store at the time, was extremely frightened, breaking into tears at one point, and Alex, Rose, and Rose's

father all felt violated and insecure as a result of Rowland's actions. Indeed, Alex indicated in his letter to the trial court that he feared that Rowland might seek retribution from him and his family.

Nor does Rowland's character speak particularly well of him. He has an extensive history of juvenile delinquency adjudications, two prior convictions for Burglary, two prior convictions for Theft, a prior conviction for Receiving Stolen Auto Parts, and a history of probation violations. He has not earned a GED or high school diploma. Prior to his conviction Rowland had regular employment to which he hopes to return upon release from prison, and began to seek mental health counseling in September 2009. Rowland has a fourteen year-old son with whom he has a good relationship, but his Pre-Sentencing Report indicates that he owes nearly $11,000 of prior unpaid child support obligations.

While we recognize that Rowland has taken steps to improve his life, we cannot say that these recent improvements in his character so outweigh the nature of his offense and his prior criminal history such that the trial court's sentence is inappropriate.

Conclusion

We find no fundamental error in the trial court's admission into evidence of Rowland's statement to Officer Prothero. Further, Rowland's conviction for attempted burglary is supported by sufficient evidence, and his sentences are not inappropriate given the nature of his offenses and his character.

Affirmed.

MATHIAS, J., and CRONE, J., concur.