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IN THE
COURT OF APPEALS OF INDIANA

JAMES N. HAMILTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-1001-CR-29
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT NO. 1
The Honorable Charles K. Todd, Jr., Judge
Cause No. 89D01-0801-FD-13

September 1, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, James N. Hamilton (Hamilton), appeals his conviction and sentence for receiving stolen property, a Class D felony, Ind. Code § 35-43-4-2(b).

We affirm.

ISSUES

Hamilton raises three issues for our review, which we restate as follows:

(1) Whether the trial court properly refused Hamilton's tendered jury instruction;

(2) Whether the evidence was sufficient to sustain Hamilton's conviction for receiving stolen property; and

(3) Whether his sentence is inappropriate when the nature of his offense and character are considered.

FACTS AND PROCEDURAL HISTORY

George Griffith (Griffith) is a retired high school basketball coach of Richmond High School. While he was a coach, he collected three rings to commemorate his teams' accomplishments: a state runner-up ring, a Hall of Fame ring, and an Indiana Basketball Coaches Association's Executive Director ring. Each ring had the year of the event, the word "GRIFF" on the sides, and either his name or initials engraved inside the rings. Griffith kept these rings in a single container in one of his dresser drawers in his bedroom.

On December 12, 2007, Griffith and his wife, Ann (Ann), returned to their home in Richmond, Indiana, after a two day trip and discovered that a big stone had been thrown through their sliding glass door in the family room and that the house had been ransacked.

Griffith and Ann walked through the house and noticed several items were stolen, including the three rings.

That same day, Hamilton went to Foster's Gallery in Richmond, Indiana, and spoke to Elizabeth Foster (Foster) about selling three gold rings. Foster made a check for $410 to "Neil Hamilton" for the rings. (Transcript p. 49). After Hamilton left the store, Foster realized that the rings she had just purchased were not collegiate rings as she had initially thought. Upon further examination, she saw Griffith's name on the rings. Foster looked Griffith's telephone number up in the telephone book and contacted him and eventually the police. Griffith came into the store and confirmed that those were his rings.

On January 30, 2008, the State filed an Information charging Hamilton with receiving stolen property, a Class D felony, I.C. § 35-43-4-2(b) and as an habitual offender, I.C. § 35-50-2-8. On December 14, 2009, a bifurcated jury trial was held and Hamilton was found guilty as charged. On January 7, 2010, the trial court conducted a sentencing hearing and sentenced Hamilton to two and one-half years for receiving stolen property and three and one-half years for being an habitual offender, to be served consecutively, for a total of six years in the Department of Correction.

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

DISCUSSION AND DECISION

I. *Refused Jury Instruction*

Hamilton first argues that the trial court abused its discretion by refusing to tender his proposed instruction to the jury. Specifically, he argues that his jury instruction, which stated

that possession alone of the stolen property, was not enough to sustain a conviction, "correctly stated the law, was supported by evidence in the record, and was not covered by other given instructions." (Appellant's Br. p. 4).

The proper instruction of the jury rests within the sound discretion of the trial court and we review its decisions for an abuse of discretion. *Barnes v. State*, 952 N.E.2d 420, 424 (Ind. Ct. App. 2010). Jury instructions are to be considered as a whole and in reference to each other, and the trial court's ruling will not be reversed unless the instructions, taken as a whole, misstate the law or mislead the jury. *Id*. When a party has challenged the trial court's refusal of a tendered jury instruction, we perform a three-part evaluation. *Taylor v. State*, 926 N.E.2d 243, 245 (Ind. Ct. App. 2010). First, we ask whether the tendered instruction is a correct statement of law. *Id*. Second, we examine the record to determine whether there was evidence present to support the tendered instruction. *Id*. Third, we determine whether the substance of the tendered instruction was covered by another instruction or instructions. *Id*. Further, any error in the refusal of a tendered jury instruction is subject to a harmless-error analysis: before a defendant is entitled to reversal, he must affirmatively show the error prejudiced his substantial rights. *Barnes*, 952 N.E.2d at 424.

Hamilton's proposed jury instruction stated the following:

> The mere possession of stolen goods shortly after a theft has occurred is not sufficient circumstantial evidence to sustain a conviction for knowingly receiving, retaining or disposing of stolen property. Rather, such knowledge must be proved or inferred from all the circumstances surrounding [Hamilton's] possession and use of the property in question.

(Appellant's App. p. 63). The State objected, arguing that the substance of the instruction was already covered by Jury Instruction No. 2, which set forth the elements of the crime. The trial court refused Hamilton's tendered instruction for three reasons: first, the substance of the instruction, referring to the knowing and intentional portion of the crime, was covered by other instructions; second, the proposed instruction had not been adopted as a pattern jury instruction; and third, there was circumstantial evidence to sustain Hamilton's conviction.

Here, we conclude that the trial court properly refused Hamilton's proposed jury instruction because the substance of the instruction is covered by three other jury instructions—particularly, Jury Instruction Nos. 2, 3 and 5. Jury Instruction No. 2 first sets forth the definition of receiving stolen property:

> Before you may convict the Defendant, the State must prove each of the following elements beyond a reasonable doubt:
>
> 1. The Defendant, James N. Hamilton
> 2. knowingly or intentionally
> 3. received, retained, or disposed of jewelry which was the property of George Griffith
> 4. when that property had been the subject of theft
> 5. and when Defendant knew the property had been the subject of the theft
> 6. and when the Defendant's receiving, retaining, or disposing of the property was not with the purpose of restoring the property to the owner.

(Appellant's App. p. 86). Additionally, Jury Instruction No. 3 defined the terms "knowingly" and "intentionally" as:

> The term "knowingly" used in conjunction with the offense charged is defined by state statute as follows:
>
> A person engages in conduct "knowingly" if, when he or she engages in conduct, he or she is aware of a high probability that he or she is doing so.

> The term "intentionally" used in conjunction with the offense charged is defined by state statute as follows:
>
> > A person engaged in conduct "intentionally" if, when he or she engaged in the conduct, it is his or her conscious objective to do so.
>
> You are further instructed with regard to the elements of "knowingly" and "intentionally" that such refers to mental states and being mental states, direct proof thereof can seldom be made and is not required by the law. Whether an act is done "knowingly" or "intentionally" is generally established by all the facts and circumstances attending the act complained of, as disclosed by the evidence. Individuals' purposes are generally revealed by their acts, and thus a "knowingly" or "intentionally" mental state, if any, with which an act is done may be determined from the act itself, taken into consideration with all the facts and circumstances surrounding the act, as disclosed by the evidence.

(Appellant's App. p. 87). Finally, Jury Instruction No. 5 defined circumstantial evidence: "Circumstantial evidence means evidence that proves a fact from which you may conclude the existence of other facts." (Appellant's App. p. 89). It is clear that when taken as a whole and read in reference to each other, the jury instructions require the State to prove beyond a reasonable doubt each element of the crime— particularly that Hamilton knew that the rings in his possession had been stolen. *See Barnes*, 952 N.E.2d at 424. Additionally, the jury could make the determination that Hamilton had knowledge that the rings were stolen solely on circumstantial evidence, inferred from the facts surrounding the case. Thus, we find that the trial court did not abuse its discretion when it refused Hamilton's proposed jury instruction.

II. *Insufficient Evidence*

Next, Hamilton argues that there was insufficient evidence to support his conviction for receiving stolen property. Specifically, he argues that the State failed to prove beyond a reasonable doubt that he knew the rings he sold to Foster had been stolen.

In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A conviction may be based upon circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

To convict Hamilton of Class D felony receiving stolen property, the State was required to prove beyond a reasonable doubt that Hamilton (1) knowingly or intentionally; (2) received, retained or disposed of; (3) the property of another person; (4) that has been the subject of a theft. I.C. § 35-43-4-2(b). Knowledge that the property is stolen can be inferred from the surrounding facts; however, it may not be inferred solely from unexplained possession of recently stolen property. *Fortson v. State*, 919 N.E.2d 1136, 1143 (Ind. 2010). Moreover,

> the mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, such possession is to be considered along with the other evidence in a case, such as how recent or distant in time was the possession from the moment the item was stolen, and

> what are the circumstances of possession (say, possessing right next door as opposed to many miles away). . . . This formulation is also consonant with the rule concerning a charge of receiving stolen property. . . .

Id.

Turning to the circumstances surrounding this case, on December 12, 2008, Griffith reported that his house had been burglarized. Hamilton concedes that he sold the rings to Foster later that day at her store located in Richmond. It is clear that the rings had identifying characteristics indicating that they belonged to another person—all three rings had the word "GRIFF" engraved on the sides. (State's Exhibits 12-14). Additionally, either Griffith's full name or initials were engraved on the insides of the rings. Upon examination, Foster was able to identify that the rings belonged to Griffith. Because Hamilton had possession of the rings in such a short time period between the time Griffith reported that his home had been burglarized, the rings were clearly identified as belonging to Griffith, and that the burglary and sale all occurred within the same town, the evidence went beyond showing mere possession. Instead, it supports a reasonable inference that Hamilton knew that the rings were stolen. Therefore, the evidence is sufficient to sustain his conviction.

III. *Appropriateness of Hamilton's Sentence*

Finally, Hamilton contends that his sentence is inappropriate considering the nature of his offense and character. Specifically, he argues that the property was promptly returned to Griffith and that he has not had a felony in over fourteen years.[1]

[1] According to Hamilton's pre-sentence investigation report, his last felony conviction was 1996. He was charged with the current crime in 2008, leaving a twelve year gap.

Regardless of whether the trial court has sentenced the defendant within its discretion, we have the authority to independently review the appropriateness of a sentence authorized by statute through Appellate Rule 7(B). *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). That rule permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). "The [principal] role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Id*. at 1225.

Hamilton was convicted of a Class D felony, for which the minimum sentence is one-half year, the maximum sentence is three years, and the advisory sentence is one and one-half year. I.C. § 35-50-2-7. Hamilton was sentenced to two and one-half years, in addition to three and one-half years for being an habitual offender. I.C. § 35-50-2-8.

With respect to the nature of the offense, we note that the facts are not particularly noteworthy: Hamilton had possession of stolen rings belonging to Griffith and sold them to Foster for money. However, when examining the character of the offender, during the sentencing hearing, the trial court described Hamilton as a "lifelong criminal" (Tr. p. 185). Over the past twenty years, Hamilton has amassed quite a lengthy criminal history: six

felonies, consisting of theft, receiving stolen property and various traffic offenses; seven misdemeanors, ranging from resisting law enforcement, carrying a handgun without a permit, and failure to provide identity; and had violated his probation two times. While Hamilton is correct in pointing out that he has not committed a felony for a period of time, he did manage to commit a second probation violation and four additional misdemeanors—the most recent occurring in 2008. Additionally, during that time period, Hamilton spent time in the Department of Correction, which may account for some of those relatively "crime free" years. It is clear that Hamilton is indeed a "lifelong criminal," undeterred by past punishments imposed by the criminal justice system. In sum, Hamilton has failed to persuade us that his sentence for receiving stolen property and being a habitual offender was inappropriate.

CONCLUSION

Based on the foregoing, we conclude that: (1) the trial court did not err when it refused his jury instruction; (2) the evidence was sufficient to sustain his conviction; and (3) his sentence is not inappropriate when the nature of his offense and character are considered.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.