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IN THE
COURT OF APPEALS OF INDIANA

LESA G. CAENEPEEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A03-0903-CR-107
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Joe V. Sutton, Judge
Cause No. 43D03-0809-FD-196

September 24, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Lesa G. Caenepeel appeals following her conviction for Theft,[1] a class D felony. Caenepeel raises the following arguments: (1) the trial court erred by denying her challenge for cause to a prospective juror; (2) the trial court erroneously admitted certain evidence in violation of Indiana Evidence Rule 404(b); (3) the trial court erroneously admitted video surveillance tapes under the silence witness theory and permitted a witness to testify regarding the contents of the videotape; (4) the evidence is insufficient to support her conviction; and (5) the trial court imposed a sentence that is inappropriate in light of the nature of the offense and her character. Finding no reversible error and sufficient evidence, and finding that the sentence is not inappropriate, we affirm.

FACTS

On the afternoon of Sunday, September 7, 2008, Tom and Sharon Swartz drove to the Elder Beerman department store in Warsaw. As the Swartzes exited their vehicle, a man "whizzed" by them in the parking lot with a shopping cart full of unbagged merchandise. Tr. p. 156, 158, 199. The man approached a nearby Chrysler LeBaron convertible and threw the merchandise onto the passenger's side floorboard. A woman with blonde hair who was wearing a scarf was seated in the driver's seat of the open convertible. The man got into the vehicle and the woman drove away; the Swartzes reported the incident to store management.

The following Sunday afternoon, September 14, the Swartzes returned to the store and parked in the same location. After shopping, Sharon waited at the door for Tom to

[1] Ind. Code § 35-41-2-4; Ind. Code § 35-43-4-2.

pull their vehicle around for her because it was raining. Suddenly, the same man the Swartzes had seen the previous Sunday brushed by Sharon, startling her. The man was again pushing a shopping cart full of unbagged merchandise out of the store and into the parking lot. In the parking lot, Tom also recognized the man and decided to intervene in the apparent theft. Tom maneuvered his vehicle to intercept the man, got out of his vehicle, and yelled at the man to leave the cart. The man walked away and got into the same convertible the Swartzes had seen the week before. As the same woman driver pulled out of the parking lot, Tom obtained the license plate number and provided it to the store manager. The merchandise, which had not been paid for, was returned to the store, where store employees ascertained that the value of the items totaled $1443.

Within minutes, Warsaw Police officers intercepted the convertible. Caenepeel was driving and her husband, Marc, was the passenger. Sharon and Tom both identified Marc from a photo array as the man who had removed the items from the store on both occasions. From a photo array provided by the police, Sharon identified Caenepeel as the driver of the convertible on September 7 but was unable to confirm that she was the driver on September 14; Tom identified Caenepeel as the driver on both occasions.

On September 16, 2008, the State charged Caenepeel with class D felony theft for aiding Marc in the offense. During jury selection, Caenepeel moved to strike Thomas Adams for cause because ten years earlier, Adams had been a police officer on the Winona Lake Police Department and had worked with Deputy Prosecutor Daniel Hampton and Judge Sutton when Judge Sutton had been a prosecutor. Adams also knew Officer Steve Rockey, a witness in this case, because they had crossed paths in the past

while performing their respective professional duties, but Adams told the trial court that he would give Officer Rockey's testimony no more bearing than any other officer. Adams also stated that he would have no difficulty being impartial. Thus, the trial court denied Caenepeel's request to strike.

At Caenepeel's jury trial, which began on February 4, 2009, Caenepeel objected to the admission of any evidence regarding the September 7 incident. The trial court overruled the objection, finding the evidence relevant to Caenepeel's knowledge, identity, intent, and plan, admonishing the jury regarding the limited purpose of the evidence. Caenepeel also objected to the admission of store video surveillance tapes and to the testimony of Sheryl Hanna, Elder Beerman's Loss Prevention Supervisor, regarding the content of the tapes. The trial court overruled the objections. At the close of the trial, the jury found Caenepeel guilty as charged.

At the February 23, 2009, sentencing hearing, the trial court found two aggravating factors—Caenepeel's criminal history and past probation violation. It found one mitigator—the hardship that would be experienced by Caenepeel's granddaughter in the event of Caenepeel's incarceration. Finding that the aggravators outweighed the mitigators, the trial court sentenced Caenepeel to two and one-half years imprisonment. Caenepeel now appeals.

DISCUSSION AND DECISION

I. Motion to Strike Juror

Caenepeel first argues that the trial court erred by denying her request to strike Adams from the jury panel for cause. As a general rule, whether a particular juror should

be excused for cause rests within the sound discretion of the trial court. Ward v. State, 908 N.E.2d 595, 597 (Ind. 2009). We will not reverse the trial court's exercise of its discretion as long as that discretion "is not exercised in an illogical or arbitrary manner." Id.

Caenepeel does not argue that Adams was actually biased against her or in favor of the State. Instead, she argues that his past profession and professional contacts with some of the people involved in this case creates implied bias, which is attributable to a prospective juror because of the existence of a relationship between the juror and one of the parties. Haak v. State, 417 N.E.2d 321, 323-24 (Ind. 1981) (explaining that the prosecutor and deputy prosecutor were included as "parties" for the purpose of an implied bias analysis).

Here, Adams was a police officer ten years before this trial with a different police department. He is not currently employed in a law enforcement or governmental capacity. During his employment as a police officer, he had professional encounters with the deputy prosecutor and Judge Sutton, who had been a prosecutor at that time. He also had professional encounters with Officer Rockey, who was the officer who pulled Caenepeel and Marc over on September 14 and testified at Caenepeel's trial about the traffic stop. We simply cannot conclude that these outdated professional encounters rise to a level that constitutes implied bias. See Woolston v. State, 453 N.E.2d 965, 968 (Ind. 1983) (finding implied bias where prospective juror's wife was employed by the state police and the juror casually knew three police officers who were to testify for the State); Porter v. State, 271 Ind. 180, 201, 391 N.E.2d 801, 817 (1979) (finding implied bias

where prospective juror was a former deputy sheriff who, at the time of trial, was serving as a special volunteer reserve deputy with the Sheriff's Department), overruled on other grounds by Fleener v. State, 412 N.E.2d 778 (Ind. 1980); Hurt v. State, 553 N.E.2d 1243 (Ind. Ct. App. 1990) (finding implied bias where prospective juror was trial judge's brother-in-law, an uncle by marriage of one of the witnesses, and a friend of a testifying police officer), overruled on other grounds by Ham v. State, 826 N.E.2d 640 (Ind. 2005). Nothing in Adams's history creates an appearance of impropriety or is analogous to the facts in past cases where implied bias has been found. Therefore, we do not find that the trial court abused its discretion by denying Caenepeel's motion to strike Adams as a juror for cause.

II. Admission of Evidence

Caenepeel next argues that the trial court erred by admitting certain evidence, namely, the Swartzes' testimony regarding the September 7 incident, the store's surveillance videos, and Hanna's testimony regarding the surveillance video footage. The admission or exclusion of evidence is left to the trial court's sound discretion, and we will reverse only if the trial court abused that discretion. C.C. v. State, 826 N.E.2d 106, 110 (Ind. Ct. App. 2005).

A. The September 7 Incident

Caenepeel argues that the trial court erred by permitting the Swartzes to testify about the September 7 incident, contending that admission of this evidence violated Evidence Rule 404(b). The State argues that Caenepeel waived this argument because at trial, she raised a different basis for the objection—relevancy. See Brown v. State, 728

N.E.2d 876, 878 (Ind. 2000) (holding that "[a] party may not object on one ground at trial and raise a different ground on appeal"). While strictly true, it is evident that the trial court treated her objection as one grounded in Rule 404(b). Therefore, we decline to find that Caenepeel waived the argument on this basis. The State also argues that Caenepeel has waived this argument because she failed to provide this court with the transcript from the pretrial hearing at which it ruled on Caenepeel's motion in limine, which sought to bar the introduction of this evidence at trial. Inasmuch as we find the appellate record sufficient to rule on the issue, we also decline to find waiver on this basis.

Turning to the substance of the argument, therefore, we observe that Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

This rule is "designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities." Hicks v. State, 690 N.E.2d 215, 218 (Ind. 1997). In determining the admissibility of extrinsic act evidence under Rule 404(b), the court must first determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to perform a wrongful act. Camm v. State, 812 N.E.2d 1127, 1131 (Ind. Ct. App. 2004). If the evidence is relevant, the court must then balance the probative value of the evidence against its prejudicial effect. Id.

Initially, we note that "[t]he necessity of proving the defendant committed the extrinsic evidence is a threshold. It is preliminary to determining whether the evidence is

probative of any issue in the case and whether its probative value outweighs its prejudicial effect." Gibbs v. State, 538 N.E.2d 937, 939-40 (Ind. 1989). The State may prove that the defendant committed the extrinsic act through eyewitness testimony and circumstantial evidence. Id. Here, Tom and Sharon both testified that on September 7, they observed Marc place numerous items that were apparently stolen from Elder Beerman into a vehicle being driven by Caenepeel. Both Tom and Sharon positively identified Caenepeel as the driver on September 7. Tr. p. 177, 179, 190, 209-10. Though Caenepeel seeks to question the reliability of their testimony, the assessment of witnesses is a task for the factfinder, not this court. We find that the Swartzes' testimony suffices to prove that Caenepeel committed the September 7 extrinsic acts.

As to whether evidence regarding the September 7 incident falls into one of the Rule 404(b) exceptions, we must consider the thrust of Caenepeel's defense. She does not dispute that she was the driver of the vehicle on September 14; thus, her identity is not at issue. Instead, she argues that the State failed to prove that she knowingly or intentionally aided Marc's theft. In other words, Caenepeel contends that she did not know that Marc had failed to pay for the items he took from the store on September 14.

The State established that on September 7, Caenepeel waited in the car while Marc went inside the store. At some point, he came "whiz[zing]" out, tr. p. 156, 158, 199, with a shopping cart full of unbagged merchandise. He threw the merchandise into the passenger's side floorboard, got into the car, and Caenepeel drove away. The incident was so troubling that the Swartzes reported it to management and noticed and recognized Marc and Caenepeel when they all returned to the store the following week. A

reasonable factfinder could infer from this evidence that Caenepeel had guilty knowledge or consciousness of guilt regarding Marc's essentially identical actions on September 14. Thus, the trial court did not err by finding this evidence to be admissible under Rule 404(b)'s knowledge exception. Dean v. State, 901 N.E.2d 648, 652 (Ind. Ct. App. 2009) (finding evidence that defendant had beaten a confidential informant and asked the informant what the Drug Task Force "had on him" was admissible to prove defendant's guilty knowledge or consciousness of guilt regarding charged drug crimes), trans. denied; Fuller v. State, 674 N.E.2d 576, 578 (Ind. Ct. App. 1996) (finding that evidence of dead and injured dogs on the defendant's property was admissible to prove defendant's knowledge that dog fighting was being conducted on his property).

B. Videotape Evidence

Next, Caenepeel argues that the trial court erred by admitting the store's surveillance video footage into evidence and by permitting Hanna, the Loss Prevention Supervisor, to testify about the footage. The videotape was admitted under the "silent witness" theory, pursuant to which videotapes and photographs may be admitted as substantive, rather than merely demonstrative, evidence. Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002). For substantive videographic evidence to be admitted under this theory and be permitted to "speak for itself," there must be a strong showing of authenticity and competency:

> "For example, in cases involving photographs taken by automatic cameras, there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera."

Rogers v. State, 902 N.E.2d 871, 876 (Ind. Ct. App. 2009) (quoting Edwards, 762 N.E.2d at 136).

Here, Hanna testified that the store has twenty-four surveillance cameras located throughout the facility that pan randomly twenty-four hours per day, seven days per week. The cameras operate on a DVR system, which records in fifteen-minute intervals over a seven-day period. Hanna focused her review of the surveillance videos between 2:00 p.m., shortly before Caenepeel and Marc entered the store, and 2:45 p.m., when Marc left. Hanna recorded the relevant time frames onto discs, which she delivered to the police department. Caenepeel acknowledges that Hanna's testimony "demonstrat[ed] the manner in which [the video] was compiled and the chain of custody from the computer to the police department and use in this trial," but argues that because no witness with personal knowledge of Caenepeel's actions inside the store testified, the State failed to establish the authenticity of the recording. Appellant's Br. p. 30.

We cannot agree. The silent witness theory applies precisely in circumstances such as these—where there is no witness with personal knowledge of the events able to testify. Had there been such a witness, the videotapes could have been used demonstratively, rather than substantively. Because there was no such witness, however, the State was required to meet the foundational requirements set forth above, and we believe that the trial court correctly determined that the State had met its burden and admitted the videotape into evidence.

Caenepeel also argues that the trial court erred by permitting Hanna to testify about her observations of the surveillance footage, inasmuch as the videotape should

have been allowed to speak for itself and Hanna had no personal knowledge of the events because she did not observe them firsthand. Thus, Caenepeel argues that Hanna's testimony invaded the province of the jury. See Groves v. State, 456 N.E.2d 720, 723 (Ind. 1983) (holding that "[i]t should be clear that if a photograph is admissible as substantive evidence because 'it speaks for itself,' a witness' opinion as to what it is saying . . . invades the province of the jury").

Even if we were to conclude that Hanna was erroneously permitted to testify regarding her observations of the videotape, we find that the error was harmless. The jurors were able to view the surveillance footage for themselves and draw their own conclusions. Hanna's testimony was merely cumulative of the videotape, which speaks for itself. Therefore, we find no reversible error on this basis.

III. Sufficiency

Caenepeel next argues that the evidence is insufficient to support her conviction. When confronted with a sufficiency challenge, we will neither reweigh the evidence nor assess the credibility of witnesses. McHenry v. State, 820 N.E.2d 124, 126-27 (Ind. 2005). In conducting our review, we must consider only the probative evidence and reasonable inferences supporting the verdict. Id.

The State prosecuted Caenepeel under an accomplice theory, pursuant to which one who aids, abets, or assists in a crime is equally as culpable as the one who commits the actual crime. Johnson v. State, 687 N.E.2d 345, 349 (Ind. 1997). Thus, the State was required to prove that Caenepeel knowingly or intentionally aided, induced, or caused Marc to commit the crime of theft. I.C. § 35-41-2-4; see also I.C. § 35-43-4-2

(explaining that someone commits theft when he knowingly or intentionally exerts unauthorized control over the property of another person with the intent to deprive the other person of its value).

The surveillance footage offered by the State shows Caenepeel and Marc entering the store on September 14. Both of them had shopping carts. They "shopped" separately and met up in the store at least two times. Caenepeel "shopped" in the children's and women's departments; Marc focused on the men's department. Marc combines the merchandise from two carts into one, positioning the full cart by the store's front door. Store employees later determined that the cart held items from the children's, women's, and men's departments. Caenepeel left the store alone.

Sharon Swartz testified that as she was waiting outside the store for her husband to pull their vehicle around, a man brushed by her who she recognized from the September 7 incident. As on September 7, he had a cart full of unbagged merchandise. Her husband also recognized Marc and noticed him walking towards the same convertible they had seen on September 7, with the same person—Caenepeel—in the driver's seat. Marc abandoned the stolen merchandise worth $1443 after a loud confrontation with Tom and got into the vehicle, at which point Caenepeel drove away. The evidence regarding the September 7 incident, as explained above, could lead a reasonable factfinder to infer that Caenepeel knew of and shared Marc's intent to commit the theft. We find that this evidence is sufficient to support Caenepeel's conviction for class D felony theft as an accomplice.

IV. Sentence

Finally, Caenepeel argues that the two-and-one-half-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and her character. In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. 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. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Here, the sentence imposed by the trial court was more than the advisory sentence of one and one-half years imprisonment but less than the maximum three-year sentence for a class D felony. Ind. Code § 35-50-2-7.

As to the nature of the offense, Caenepeel and Marc "shopped" in the Elder Beerman store for forty-five minutes before Marc stole thirty-nine items worth nearly $1500. Had it not been for the intervening, courageous behavior of the Swartzes, Caenepeel and Marc would have driven off with a significant amount of stolen merchandise—likely for a second time.

As for Caenepeel's character, the record reveals that she has an extensive criminal history. She has been convicted for public intoxication, visiting a common nuisance, class B felony dealing in cocaine, class D felony theft, two class D felony forgery convictions, false informing, and class D felony receiving stolen property. Thus, the present conviction is Caenepeel's sixth felony conviction and fifth conviction for a property crime. When Caenepeel committed the dealing in cocaine offense, she violated probation.

Caenepeel emphasizes that her last conviction occurred in 2000, but admitted that she used cocaine from 1990 until 2007. Moreover, although she testified at the

sentencing hearing that she has not used drugs since 2004, she admitted to her probation officer that she used cocaine until 2007. Thus, she was not fully honest with the trial court. Regardless, it is evident that Caenepeel's unwillingness to obey the rule of law has continued long past her 2000 conviction. Additionally, Marc was on work release in Elkhart County when Caenepeel picked him up and drove him to the Elder Beerman store on September 7 and 14, thereby violating the terms of his work release; these actions further demonstrate Caenepeel's disregard for the rule of law.

Caenepeel emphasizes that she was assisting her son's family in caring for her granddaughter, who has special medical needs. That is true, and the trial court recognized the hardship on the granddaughter as a mitigating circumstance. At the time of the sentencing hearing, the granddaughter was two to two-and-one-half years old, meaning that Caenepeel committed the offense and likely continued using cocaine after the birth of her granddaughter.

Given Caenepeel's significant criminal history, refusal to obey the rule of law, continued law-breaking behavior even after the birth of her granddaughter, and the nature of her offense herein, we do not find the sentence imposed by the trial court to be inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.