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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER M. HICKEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A04-0903-CR-156
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0806-FC-92

September 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Christopher Hickey appeals his conviction and seven-year sentence for burglary. Hickey argues that insufficient evidence exists to sustain his conviction, the trial court erred by refusing his tendered jury instruction, and his sentence is inappropriate. We affirm.

Facts and Procedural History

On June 24, 2008, Hickey and his family went to Indiana Beach Campground. While there, Hickey visited the campground store between five and ten times. In the early hours of June 25, 2008, Hickey spoke to a campground security guard and asked to use the guard's cell phone. The guard noticed that Hickey had a tattoo on his right forearm of a flower with writing.

The campground store was burglarized soon after. Video surveillance from the campground store showed that, around 2:30 a.m., a man broke in by shattering the glass in the front door and then left. The man subsequently returned to and left the campground store two more times between the first break-in and 5:00 a.m. During that time, the man disabled the motion detectors by ripping the keypad to the burglar alarm off the wall, used his left elbow to shatter the glass on an interior door leading to the storeroom, and stole cigarettes and alcohol.

Hickey and his wife left Indiana Beach Campground around 6:30 a.m. The security guard went to the campground store around 8:00 a.m. after receiving information about the break-in. When the police arrived, the security guard viewed the surveillance videos and recognized the flower tattoo on the perpetrator's right forearm. Deputies from

the White County Sheriff's Department were then directed to the perpetrator's campsite and learned Hickey's name through family members. They later located Hickey in Starke County and transported him back to White County. Hickey had several fresh cuts on his body.

In an audio- and video-recorded interview, Hickey admitted to breaking into and stealing from the campground store. After leaving Indiana Beach Campground, his wife "told him he was stupid and told him to throw . . . the items that he took out the window of the car," Tr. p. 68, and he complied. A forensic DNA analyst confirmed that the DNA profile of the blood found inside the campground store matched the DNA profile of the blood collected from Hickey. Hickey's fingerprints were found on an opened screwdriver package inside the store, and two screwdrivers were found inside the vehicle Hickey used to drive home with his wife.

The State charged Hickey with burglary as a Class C felony.[1] At the close of the jury trial, Hickey proposed the following jury instruction:

> **Confession- Not conclusive of guilt**
>
> Confessions, even those found to be voluntary, *are not* conclusive of guilt. And, as with any other part of the State's case, a confession may be shown to be insufficiently corroborated or otherwise unworthy of belief.
>
> **Authority:** *Shanabarger v. State*, 846 N.E.2d 702, 712 (Ind.Ct.App. 2006)
>
> **Note:** In *Shanabarger*, Sullivan, J., in concurrence endorsed the above instruction proposed by the defense instead of the instruction given by the trial court substituting "may be" for "are not", stating "the instruction [as given] leaned a bit more to the permissible conclusion that the confessions

[1] Ind. Code § 35-43-2-1.

> were conclusive of guilt rather than to the contrary conclusion as contained in the tendered instruction."

Appellant's App. p. 21 (emphasis and alteration in original). The trial court refused this instruction and instead gave the following instruction: "Evidence has been introduced that the Defendant made a statement concerning the crime charged. It is for you to determine what value should be given to the statement." *Id.* at 28. The trial court also instructed the jury that it had the right to determine the facts, *id.* at 22, and the duty to decide what value to give to exhibits and testimony, *id.* at 26. The jury found Hickey guilty of burglary.

At the sentencing hearing, the trial court identified the following aggravating circumstances: (1) Hickey's prior criminal history, including a prior felony conviction in Cook County in Illinois in 2007 for receiving/possessing/selling a stolen vehicle, (2) Hickey was on probation for the Cook County offense while he committed the present offense, (3) there was a probation revocation warrant outstanding with regard to the Cook County offense, (4) Hickey's pending charges for criminal behavior in Starke County and the fact that those allegations are similar in nature to the present offense, and (5) the nature and circumstances of the present offense. In addition, the trial court identified the following mitigating circumstances: (1) Hickey's age of nineteen years, (2) Hickey's two young dependent children, who will be without Hickey's support during his incarceration, and (3) Hickey's mental health history, which includes being hospitalized for attempted suicide and anger issues and suffering from anxiety, depression, and a sleep disorder. After finding that the aggravating factors outweighed the mitigating factors, the

trial court imposed a seven-year sentence without probation, to be served in the Indiana Department of Correction. Hickey now appeals.

Discussion and Decision

On appeal, Hickey argues that insufficient evidence exists to sustain his conviction, the trial court erred by refusing his tendered jury instruction, and his sentence is inappropriate.

I. Sufficiency of the Evidence

Hickey contends that the evidence is insufficient to support his conviction for burglary. When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts confirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id*.

To convict Hickey of burglary as charged here, the State had to prove that he broke and entered the building or structure of another person with intent to commit a felony in it. *See* Ind. Code § 35-43-2-1. The evidence most favorable to the verdict

reveals that Hickey visited the campground store between five and ten times during his stay at Indiana Beach Campground, that the security guard with whom he spoke recognized his flower tattoo on the perpetrator's right forearm in the surveillance videos, that Hickey threw the stolen items out of the car, that he confessed to the burglary in an interview with the police, that the DNA profile of the blood at the scene matched the DNA profile of blood collected from Hickey, and that Hickey's fingerprints were on an opened screwdriver package found at the scene.

Despite this clear evidence, Hickey argues that the security guard only recognized the perpetrator's tattoo, not his face, in the surveillance videos. He claims that his fingerprints and blood could be explained by the fact that he had cut himself prior to going to the campground store the day before the burglary and that he could have handled the screwdriver package at that time. He points to testimony of his wife and aunt, the owner of the car, both of whom deny seeing any stolen items in the car. Finally, Hickey suggests that his confession can be explained by his urge to protect his brother, who he may have thought committed the crime, and his consumption of Xanax, beer, and vodka before the confession. To the extent that witnesses offered conflicting accounts of the details, it was within the province of the jury to decide whom to believe and which details were important. In short, Hickey asks us to reweigh the evidence and reassess witness credibility, which we may not do. The evidence is thus sufficient to sustain Hickey's conviction.

II. Jury Instruction

Hickey next contends that the trial court erred by refusing his tendered jury instruction regarding a defendant's confession. The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. Ct. App. 2003). Instructing the jury lies within the sole discretion of the trial court, and considering the instructions as a whole and in reference to each other, we will not reverse for an abuse of that discretion unless the instructions mislead the jury as to the law in the case. *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002), *reh'g denied*. When a trial court gives or refuses a tendered instruction, we consider whether the instruction: (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. *Overstreet*, 783 N.E.2d at 1164. We will review the instruction *de novo* if the challenge is that it incorrectly states the law. *Id.* However, if the challenge is that the instruction is not supported by the evidence in the record or that the substance is not covered by other instructions, we will reverse only if the trial court has abused its discretion. *Id.*

The State argues that Hickey's tendered instruction was covered in substance by other instructions. Hickey's tendered instruction provided, in relevant part:

> Confessions, even those found to be voluntary, *are not* conclusive of guilt. And, as with any other part of the State's case, a confession may be shown to be insufficiently corroborated or otherwise unworthy of belief.

Appellant's App. p. 21. The trial court's final instructions included the following:

> Evidence has been introduced that the Defendant made a statement concerning the crime charged. It is for you to determine what value should be given to the statement.[2]

Instruction No. 12, Appellant's App. p. 28.

> Under the Constitution of Indiana you have the right to determine both the law and the facts.

Instruction No. 2, *id.* at 22.

> You are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.

Instruction No. 10, *id.* at 26.

Applying an abuse of discretion standard, we find that Hickey's tendered instruction, advising that a confession is not conclusive of guilt and may be shown to be of little or no value, was sufficiently covered in substance by the foregoing final instructions. The final instructions, as a whole and in reference to each other, instructed the jury that it was free to determine whether a confession had been made and what value, if any, should be given to that confession. We decline to find that the trial court

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[2] The trial court gave this instruction instead of Hickey's tendered instruction. We note that the Indiana Pattern Jury Instructions include a similar instruction:

> *Evidence has been introduced that the Defendant made a statement concerning the crime charged.* It is for you to determine, in light of all the circumstances under which the statement was made, if it was properly obtained by the [police, prosecutor, law enforcement.] The law does not allow the [police, prosecutor, law enforcement] to obtain a statement by [abuse, threats, duress, or violence] [false promises]. If you find that [police, prosecutor, law enforcement] obtained the statement by such means, you should not consider the statement as evidence against the Defendant. If you find from a consideration of all the evidence that the statement was properly obtained by [police, prosecutor, law enforcement], then *it is for you to determine what value should be given to the statement.*

2 Ind. Pattern Jury Instructions – Criminal, Instruction No. 12.03 (3d ed. 2008) (emphasis added). Here, Hickey's statement was made after being advised of his *Miranda* rights. With the language regarding a properly obtained statement removed from the Indiana Pattern Jury Instruction, as no evidence in the record supported including such language, the instruction given by the trial court is the same.

abused its discretion in refusing to give Hickey's tendered instruction and instead giving Instruction No. 12.

III. Appropriateness of the Sentence

Hickey also contends that his seven-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a 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." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, we concede that it is not particularly egregious. Hickey broke into a store, left, and then returned two more times in the span of two and a half hours. He ripped the burglar alarm's keypad off the wall to disable the motion sensors, and he stole cigarettes and alcohol.

As for Hickey's character, we acknowledge that Hickey has mental health issues, which was also recognized by the trial court. Tr. p. 363. However, Hickey's criminal record alone justifies the sentence imposed by the trial court. The Pre-Sentence Investigation Report reflects that Hickey, nineteen years old at the time of the offense,

has a history of delinquent and criminal activity. As a juvenile, Hickey was adjudicated a delinquent for trespass and illegal consumption of an alcoholic beverage. Although he disputes many of the crimes attributed to him in the PSI, Hickey himself admits on appeal that he has two prior felony convictions, Appellant's Br. p. 17, including receiving/possessing/selling a stolen vehicle in Cook County, Illinois. It was while Hickey was on probation for this Cook County offense that he burglarized the campground store. At the time of Hickey's sentencing, charges in three different cause numbers were pending in Starke County: battery as a Class B misdemeanor, burglary as a Class B felony, burglary as a Class C felony, theft as a class D felony, and burglary as a Class B felony. Even since his incarceration for the present offense, Hickey has been written up for such actions as disruptive conduct, making or possessing intoxicants, possession of unauthorized clothing, being in an unauthorized area, communication between blocks, and unauthorized possession and damaging county property. In conclusion, Hickey has failed to persuade us that his seven-year sentence is inappropriate in light of his character and the nature of his offense.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.