

Case Summary and Issues

Allen Elston appeals his conviction, following a jury trial, of theft as a Class D felony. For our review, Elston raises two issues: whether the evidence was sufficient to support his conviction of theft, and whether the trial court erred in allowing an amendment of the charging information to correct the date of the alleged theft during trial. Concluding the evidence was sufficient and the trial court did not err in permitting the State to amend the original charging information, we affirm.

Facts and Procedural History

On July 18, 2008, Rebecca Randolph was working at the Indiana Lighting Company. Elston came into the store that day and said he had left a gym bag, containing his identification and other items, outside the store next to a tree the night before. Although Randolph thought Elston's statement was bizarre, she went outside with him to look for the gym bag. The two did not find the gym bag and came back inside the store so Randolph could get the telephone number of the store's lawn mowing service in case they had seen the gym bag. Randolph had to leave the showroom to get the number from the store office, leaving Elston alone on the showroom floor. Randolph gave Elston the number and he left the store. When Randolph was ready to leave work for the day, she realized her purse was gone from underneath her desk, which is located on the showroom floor. In court, Randolph identified Elston as the man who entered the store on July 18, 2008, claiming to have left his bag outside of Indiana Lighting Company.

Stan Wallace was also an employee at Indiana Lighting. He was working on July 18, 2008, and heard Elston ask about a bag he had left outside. Wallace did not interact with Elston on that date, but he was also working on July 22, 2008, when Elston returned

to the business and again inquired about his bag. Elston asked Wallace to contact him if anyone happened to find his gym bag. Elston wrote down his name for Wallace, but did not give any other information. After Elston left, Wallace, who recognized Elston from his visit several days before, told other store personnel to call the police. Police arrived on the scene and placed Elston under arrest. In court, Wallace identified Elston as the man he saw in the store on July 18 and 22, 2008.

A security camera was operating in the building on July 18, 2008. In the video, Elston is seen walking around the desks in the showroom, looking around, reaching around a desk, picking up Randolph's purse, and putting it under his shirt. Randolph and Wallace both viewed the video and identified Elston as the man in the video. Randolph and Wallace also reviewed a six-person photo array and identified Elston as the man who was in their store on July 18 and 22, 2008.

The State charged Elston with theft, a Class D felony, alleging that "[o]n or about July 17, 2008," Elston knowingly exerted unauthorized control over Randolph's purse. Appellant's Appendix at 19. On the day of trial, after two witnesses had testified, the State moved to amend the charging information to change the date of the incident from occurring on or about July 17, 2008, to occurring on July 18, 2008. The trial court granted the motion. A jury found Elston guilty. Elston now appeals his conviction of theft.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing the sufficiency of the evidence to support a criminal conviction, we do not reweigh the evidence or judge witnesses' credibility. Wright v. State, 828 N.E.2d 904, 905-06 (Ind. 2005). Rather, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Therefore, we will affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

B. Evidence of Theft

To convict Elston of theft as a Class D felony, the State must prove beyond a reasonable doubt that Elston: (1) knowingly; (2) exerted unauthorized control over the property of another person; (3) with the intent to deprive the other person of any part of its value or use. Ind. Code § 35-43-4-2(a). To “exert control over property” means, in part, to obtain, take, possess, or carry the property. Ind. Code § 35-43-4-1(a).

Elston contends the evidence is insufficient to convict him of theft because he testified he was not the man depicted in the video. He testified he left his gym bag behind the building in June 2008 and came into the store a few times in June and July to inquire about it. Elston testified he left his name and number at the store each time. The evidence favorable to the verdict is that both Randolph and Wallace identified Elston in court as the man who first came into the store on July 18. Both Randolph and Wallace

viewed the surveillance video and identified Elston as the man depicted in the video taking the purse. The jury also reviewed the video. Randolph testified she did not give Elston permission to take her purse. Elston's claim that he was not the man in the video is purely a request for this court to reweigh the evidence and draw its own inferences, which we will not do. McHenry, 820 N.E.2d at 126. We conclude that the State presented sufficient evidence to support Elston's conviction of theft.

II. Allowing Amendment of the Charging Information

Elston also argues the trial court erred in allowing the State, over his objection, to amend the charging information to correct the date of the alleged theft. Indiana Code section 35-34-1-5 reads, in pertinent part:

(a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:

(1) any miswriting, misspelling, or grammatical error;

* * *

(7) the failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;

* * *

(9) any other defect which does not prejudice the substantial rights of the defendant.

* * *

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

“A charging information may be amended at various stages of a prosecution, depending on whether the amendment is to the form or to the substance of the original information.”

Fajardo v. State, 859 N.E.2d 1201, 1203 (Ind. 2007).

An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the information in either form. Further, an amendment is of substance only if it is essential to making a valid charge of the crime.

Id. at 1205 (quotation omitted).

Elston claims he was prejudiced by the amendment because of “the specificity of the date in the State’s case.” Appellant’s Brief at 9. Wallace testified that Randolph’s purse went missing on July 18, 2008, but the probable cause affidavit, signed by Detective Jeff Thomas, states the date was July 17, 2008. The original charging information also alleged the incident occurred “on or about” July 17, 2008. In Ricketts v. State, 498 N.E.2d 1222, 1224 (Ind. 1986), our supreme court held that since the defendant did not file an alibi defense and time was not of the essence to the charge, allowing the State to amend the information on the day of trial to reflect the date the evidence showed the offense was committed did not change the positions of the parties or substantially prejudice the defendant. Similarly, Elston did not raise an alibi defense for the date originally alleged in the charging information, and the date of the offense was neither an essential component of his defense nor essential to proving the charge. Elston does not allege he was misled in any way by the incorrect date in the original information or that the amendment was a surprise which left him unprepared. In fact, Elston acknowledged to the trial court that “We’re not saying he’s not the individual on the video because he was at Wal-Mart shopping on the same date. We’re saying that’s not him. His whereabouts other than in that video, is irrelevant.” Transcript at 49. Therefore, the amendment of the date was one of form, not substance, Elston was not

prejudiced by the amendment, and the trial court did not err in allowing the State to amend the information on the day of trial.

Conclusion

Sufficient evidence supports Elston's conviction of theft and the trial court did not err in allowing amendment of the charging information at trial.

Affirmed.

MAY, J., and VAIDIK, J., concur.