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IN THE COURT OF APPEALS OF INDIANA

JAMES M. WRIGHT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0703-CR-130
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0601-FD-44

August 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

James M. Wright appeals his conviction for class D felony theft and various aspects of the trial court's sentencing order. We affirm in part, vacate in part, and remand.

Issues

We restate the issues as follows:

I. Whether sufficient evidence supports Wright's theft conviction;

II. Whether the trial court abused its discretion in imposing consecutive sentences;

III. Whether the trial court abused its discretion in ordering restitution; and

IV. Whether the trial court erred in ordering Wright to pay various fines, fees, and costs without holding a hearing to determine his ability to pay.

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that at approximately 1:00 a.m. on January 28, 2006, Tim Gibson was leaving work at an Elkhart factory when he saw Wright, wearing a blue bandana as a mask, trying to get into a car in the parking lot. A woman inside the car was screaming. Gibson yelled at Wright and ran around the front of Gibson's truck while Wright ran around the back of the truck and away from the scene. Gibson stopped to talk with the woman in the car, who told him to call the police. Gibson saw that Wright was too far away to pursue on foot, so he got into his unlocked truck and

gave chase.[1] Gibson caught up with Wright, clipped the left side of his body, and knocked him out of his shoes.

Wright jumped up and said, "Okay you got me." Tr. at 16. Gibson noticed that Wright had Gibson's cell phone and either his wallet or his CD holder in his hand. Wright threw the phone. When Gibson reached down to pick it up, Wright ran off. Gibson got back in his truck but could not find Wright, so he drove back to the factory and called the police. While Gibson was waiting for the police, he noticed that his wallet was missing from his truck. Police found Wright, who matched the description given by Gibson, less than a mile away. Wright had no shoes, was wearing bloody socks, and had a large abrasion on his left side. Eighteen-year-old Wright had obviously been drinking alcohol and had a blue bandana in his pants pocket. Gibson identified Wright as the person he had hit with his truck. Gibson's wallet was never found.

On January 31, 2006, the State charged Wright with class D felony theft of Gibson's cell phone and class C misdemeanor illegal consumption of alcohol. Three days later, the trial court appointed a public defender to represent Wright. At a jury trial on August 7, 2006, Wright admitted that he had illegally consumed alcohol. The jury found him guilty as

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[1] At trial, Gibson explained,

> My truck door was open because I normally I—when I lock— it was [a] rather warm night that night for Feb—January. Normally I let my truck just warm up and I go back in and lock everything up. My seeing the door was open in my truck so I opened the door and looked around and he's way over there. I knew I couldn't catch him on foot so I jumped in my truck and I chased after him.

Tr. at 15.

charged. On September 20, 2006, the trial court sentenced Wright to three years on work release for the theft conviction, with one year suspended to probation, and to a concurrent term of sixty days in jail for the alcohol conviction. The trial court ordered that Wright's sentence be served consecutive to a sentence in another cause in which he was serving probation when he committed the instant crimes. The trial court ordered Wright to pay $225 in fines plus court costs. The trial court also assessed a $1000 public defender fee, to be paid when Wright was in the work release program. Finally, the trial court ordered Wright to pay $146 in restitution; the record indicates that Gibson had requested that amount for his missing wallet.

On January 5, 2007, Wright's public defender submitted a verified motion to file a belated notice of appeal, which the trial court granted that same day. On March 1, 2007, the trial court appointed pauper appellate counsel for Wright.

Discussion and Decision

I. Sufficiency of Evidence

Wright challenges the sufficiency of the evidence supporting his theft conviction. Our supreme court recently reiterated our standard for reviewing such claims:

> 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. 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.… Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (citations, quotation marks, and footnote omitted) (emphasis in *Drane*). "Expressed another way, appellate courts must affirm if the

probative evidence and reasonable inferences drawn from that evidence *could* have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." *Id*. at 147 n.4 (citation and quotation marks omitted) (emphasis in *Drane*).

Wright contends that he "is not asking this Court to reweigh the evidence." Appellant's Br. at 10. On the contrary, Wright is asking us to do exactly that. *See id*. ("[Wright] is asking this Court to analyze the facts because the victim's version of the facts cannot be implied from the evidence of location where the defendant was found, the facts surrounding the return of the cell phone, or the condition the defendant was in at the time the sheriff's deputies located him."). We must decline Wright's invitation and affirm his theft conviction.

II. Consecutive Sentences

Wright asserts that the trial court erred in ordering his sentence to be served consecutive to the sentence in another cause in which he was serving probation when the instant crimes were committed. We review a trial court's sentencing decision for an abuse of discretion. *Plummer v. State*, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006). Indiana Code Section 35-50-1-2(d) provides that if, after being arrested for one crime, a person commits another crime before the date the person is discharged from probation, "the terms of imprisonment for the crimes *shall* be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed." (Emphasis added.) In other words, the trial court was required by statute to order Wright's sentences to be served consecutively. As such, we find no abuse of discretion.

III. Restitution

Next, Wright contends that the trial court erred in ordering him to pay restitution for Gibson's wallet, which he was not charged with stealing. We note that

> a trial court has the authority to order a defendant convicted of a crime to make restitution to the victims of the crime. Ind. Code § 35-50-5-3. The purpose of a restitution order is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victims *caused by the offense*. An order of restitution is a matter within the sound discretion of the trial court, and we will only reverse upon a showing of an abuse of that discretion. An abuse of discretion occurs if the court's decision is clearly against the logic and effects of the facts and circumstances before it.

Henderson v. State, 848 N.E.2d 341, 345-46 (Ind. Ct. App. 2006) (emphasis added) (some citations omitted).

Wright acknowledges that he did not object at the sentencing hearing, which normally results in waiver. *Slinkard v. State*, 807 N.E.2d 127, 129 (Ind. Ct. App. 2004). The State essentially concedes, however, that the error is fundamental. Appellee's Br. at 10 (citing *Bennett v. State*, 862 N.E.2d 1281, 1287 (Ind. Ct. App. 2007)). Indeed, it is well settled that "restitution may not be ordered for uncharged crimes." *Hipskind v. State*, 519 N.E.2d 572, 572 (Ind. Ct. App. 1988), *trans. denied*. We therefore vacate the restitution order. The State asks that we remand "to the trial court for rehearing as to any actual restitution owed to Gibson[,]" Appellee's Br. at 10, but it cites no authority for awarding a second bite at the restitution apple. We decline to do so here.

IV. Fines, Fees, and Costs

Finally, Wright argues that the trial court erred in assessing various fines, fees, and costs without holding a hearing to determine his ability to pay.[2] Whenever the court imposes costs and fines, "it shall conduct a hearing to determine whether the convicted person is indigent." Ind. Code §§ 35-38-1-18 (fines), 33-37-2-3 (costs). Some cases have held that "a separate indigency hearing is not required when a trial court appoints pauper counsel to represent the defendant at trial and to represent him on appeal because these actions indicate an intention by the trial court to find the defendant indigent." *Purifoy v. State*, 821 N.E.2d 409, 414 (Ind. Ct. App. 2005) (citing *Clenna v. State*, 782 N.E.2d 2d 1029, 1034 (Ind. Ct. App. 2003)), *trans. denied*. The State points out that the trial court appointed pauper counsel to represent Wright both at trial and on appeal and argues that an indigency hearing is unnecessary.

We note, however, that the trial court imposed a $1000 public defender fee at the sentencing hearing, which runs contrary to a finding of indigency. The trial court remarked that Wright could pay the fee while he was on work release, but it heard no evidence regarding the current or future state of Wright's finances. Under these circumstances, we remand for an indigency hearing to determine Wright's ability to pay the various fines, fees, and costs imposed by the trial court.

Affirmed in part, vacated in part, and remanded.

DARDEN, J., and MAY, J., concur.

[2] Once again, Wright acknowledges that he failed to object to the assessment of fines, fees, and costs at the sentencing hearing. The State notes that failure to object normally results in waiver but addresses the issue on the merits, as do we.