ATTORNEY FOR APPELLANT:

**LEANNA WEISSMANN**
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**JODI KATHRYN STEIN**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| JABE E. STEWART, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 15A01-0612-CR-539 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Sally Blankenship, Judge
Cause No. 15D02-0606-FC-9

**September 25, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Jabe E. Stewart appeals his convictions and sentences for two counts of forgery, two counts of attempted theft, and one count of counterfeiting. We affirm in part and vacate in part.

## Issues

Stewart presents four issues for our review. We briefly touch upon his double jeopardy argument, which is conceded by the State, and then address the following restated issues:

I. Whether the convictions are supported by sufficient evidence;

II. Whether the forgery penalty is constitutionally proportionate; and

III. Whether his sentence was appropriate in light of the nature of the offenses and his character.

## Facts and Procedural History

The evidence most favorable to the convictions reveals that on October 31, 2005, Robert Taul arrived at Merchant's Bank in Aurora, Indiana, where he presented for deposit in his account a $750 United States Postal Service money order payable to Stewart. Tr. at 22-24, 49, 90, 95; State's Exh. 1. The money order had been purchased by "Kelly Smith" of Madison, Wisconsin, and endorsed on the back by both Stewart and Taul. Tr. at 23-24; State's Exh. 1. As per bank policy, a hold was placed on the funds until the money order cleared. Ten days later, the money order, which was identified as counterfeit, was returned to Merchant's Bank.

Kimberly Tremain, Merchant's Bank assistant vice president, contacted the Aurora Police Department regarding the counterfeit money order. During his investigation of the complaint, Aurora Police Officer Jared Dausch interviewed Stewart, who claimed that he had received the money order as payment for porcelain dragons that he sold on the internet. Stewart told Officer Dausch that "he knew when he found out that the money order was counterfeit that i[t] was dumb that he tried to cash it for money and he would never do this again." Tr. at 50-51. Stewart took "other money orders to the Lawrenceburg Post Office and gave them to the Postmaster since he knew that they [too] were counterfeit." *Id.* at 50.

On May 25, 2006, Stewart went to the Aurora Post Office, where he presented a $750 United States Postal Service money order payable to him. *Id.* at 28, 32, 90. Velda Miller, the postal clerk who waited on him, noticed that the color was different, that it was a Washington, D.C. issue money order, that a Texas purchaser was listed, that it was six months old, and that it lacked a watermark. *Id.* at 28. Miller explained to Stewart that the combination of these facts made her suspicious of the money order's authenticity. Stewart reacted calmly and agreed to leave his name and phone number, so Miller could contact him after she looked into the matter further. Thereafter, Postmaster Robert Hamilton ("Postmaster"[1]) determined that the money order was counterfeit. Postmaster then called Stewart, who stated that he was selling something on eBay and that he "felt uncomfortable about the money order." *Id.* at 40.

[1] We refer to Robert Hamilton as "Postmaster" to prevent confusion when later discussing Officer Brett Hamilton.

Postmaster contacted the Aurora Police Department. During his investigation of the counterfeit money order, Officer Brett Hamilton called Stewart. Stewart explained that he sold items on eBay and offered to produce verification. However, Stewart failed to appear at the police department as promised, let alone bring documentation to support his story. *Id.* at 55-56. Upon discovering that other open case reports concerning Stewart existed, Officer Hamilton contacted Officer Dausch, and the two officers requested assistance from a detective.

On June 6, 2006, Detective Brian Fields and two Aurora police officers interviewed Stewart. Stewart explained that the money order was payment for a Cabbage Patch Doll that he sold on eBay or another unidentified internet auction site. Although Stewart stated that he possessed no other money orders, a subsequent consensual search of his residence revealed six additional counterfeit money orders. Each money order was payable to Stewart from "A. Salas" from San Antonio and, with one exception, they were in sequential order. In another interview, Stewart maintained that people "just send these [money orders] to him, he's a lucky man, he just gets them and puts them in a box" when he receives them in the mail. *Id.* at 60. Police found a dirty, unpackaged Cabbage Patch Doll at Stewart's residence. Further investigation indicated that the only item Stewart had ever posted for sale on eBay was a porcelain train that never sold.

On June 8, 2006, the State filed an information charging Stewart with two counts of forgery as class C felonies, two counts of attempted theft as class D felonies, and one count of counterfeiting as a class D felony. Appellant's App. at 7-10. A jury found Stewart guilty

as charged. The court ordered eight-year sentences for the class C felonies and three-year sentences for the class D felonies, all to be served concurrently.

## Discussion and Decision

### *Double Jeopardy*

Stewart asserts that in both the Merchant's Bank incident and the Aurora Post Office incident, attempted theft was a lesser-included offense of forgery. *Cf. Logan v. State*, 693 N.E.2d 1331, 1332 (Ind. Ct. App. 1998) (two counts of theft were lesser-included offenses of forgeries), *trans. denied*. Further, he contends that in both instances, the same evidence was used to convict him for forgery and attempted theft. As such, Stewart claims double jeopardy violations when he was convicted and sentenced on counts of attempted theft *and* forgery. *See Richardson v. State*, 717 N.E.2d 32, 56 (Ind. 1999) (Sullivan, J., concurring); *see also Guyton v. State*, 771 N.E.2d 1141, 1143 (Ind. 2002) (discussing rules of statutory construction and common law that are separate from the constitutional double jeopardy protections; noting rule prohibiting "conviction and punishment for a crime which is a lesser-included offense of another crime for which the defendant has been convicted and punished").

At Stewart's trial, the State acknowledged that the attempted theft charges were factually included in the forgery charges as specified in the information. Tr. at 93-94. That is, attempting to cash counterfeit money orders formed the basis of both charges. On appeal, the State acknowledges that the attempted theft convictions and sentences should be vacated. Appellee's Br. at 15 n.4. We agree. *See Webster v. State*, 708 N.E.2d 610, 616 (Ind. Ct. App. 1999) (holding that "where a defendant is found guilty of both the greater offense and

the lesser included offense, the trial court's proper procedure is to vacate the conviction for the lesser included offense and enter a judgment of conviction and sentence only upon the greater offense"), *trans. denied*. Therefore, we remand this cause to the trial court with an order to vacate Stewart's convictions for attempted theft. *See also Morrison v. State*, 824 N.E.2d 734, 742 (Ind. Ct. App. 2005) (remanding for vacation of lesser included convictions), *trans. denied.*

### *I. Sufficiency of Evidence*

Our standard of review for sufficiency claims is well settled. In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and the reasonable inferences favorable to the verdict, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Tyson v. State*, 766 N.E.2d 715, 717-18 (Ind. 2002) (citing *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)).

#### *A. Forgery*

Stewart contends that the State failed to present sufficient evidence of mens rea. He asserts that his forthrightness (providing his contact information, permitting a search of his residence) shows he did not intend to defraud either the bank or the post office in the presentment of the fake money orders.

To convict a defendant of forgery, the State must prove beyond a reasonable doubt that the defendant, with the intent to defraud, made or uttered a written instrument in such a matter that it purports to have been made by authority of one who did not give authority. Ind. Code § 35-43-5-2(b)(4). Intent to defraud involves an intent to deceive; there must be "a

*potential* benefit to the maker or *potential* injury to the defrauded party." *Jacobs v. State*, 640 N.E.2d 61, 65 (Ind. Ct. App. 1994) (emphases added), *trans. denied*. With intent being a mental state, often the fact finder must resort to the reasonable inferences based upon an examination of the surrounding circumstances to determine whether, from the person's conduct and the natural consequences that might be expected from that conduct, there exists a showing or inference of the required criminal intent. *M.Q.M. v. State*, 840 N.E.2d 441, 446 (Ind. Ct. App. 2006). That is, absent an admission, intent in a forgery prosecution – or in any crime for that matter – may be proven by circumstantial evidence. *Williams v. State*, 541 N.E.2d 921, 923 (Ind. 1989) (citing *Wendling v. State*, 465 N.E.2d 169, 170 (Ind. 1984)).

Here, Stewart was charged with making or uttering[2] a $750 counterfeit United States Postal Service money order on two separate occasions. Appellant's App. at 7-8. In support of the charges, the jury heard the following. Between October 2005 and May 2006, Stewart possessed twelve $750 counterfeit money orders payable to him. After Stewart's associate presented one of these money orders at Merchant's Bank on October 31, 2005, Stewart was contacted about its counterfeit nature. Stewart claimed that the money order was payment for the undocumented internet sale of a porcelain dragon. Upon turning in five other fake money orders to the Lawrenceburg Post Office, Stewart acknowledged that it was not smart to try to cash counterfeit money orders and promised not to do it again.

Alas, just seven months later, Stewart presented another counterfeit money order at a different post office. When confronted this time, Stewart gave a similar undocumented

[2] To utter is to "issue, authenticate, transfer, publish, deliver, sell, transmit, present, or use." Ind. Code § 35-41-1-27.

internet sale explanation, did not show up at the police station, and professed to have no other money orders. Yet, police investigation indicated that Stewart's entire internet sales history consisted of posting one item, a porcelain train that never sold. Moreover, when a subsequent search of Stewart's residence turned up six additional counterfeit money orders, all payable to Stewart from the same person, and all but one in sequential order, Stewart's story was that people "just send these [money orders] to him, he's a lucky man, he just gets them and puts them in a box" when he receives them in the mail. Tr. at 60.

Faced with the above evidence at trial, the jury could easily have concluded that Stewart had the required mens rea to commit forgery. In light of the circumstances presented, we will not second-guess the jurors' determination that Stewart intended to defraud. To do so would be to impermissibly reweigh evidence and judge credibility. *See Sanders v. State*, 782 N.E.2d 1036, 1039 (Ind. Ct. App. 2003) (concluding that "sufficient evidence of Sanders' intent was presented to support his conviction for forgery and theft").

### *B. Counterfeiting*

Stewart challenges the mens rea element of his counterfeiting conviction as well. He contends he was not acting like a "guilty man." Appellant's Br. at 8.

To convict Stewart of counterfeiting, the State had to prove that he knowingly or intentionally possessed more than one written instrument (money order) knowing that the written instruments (money orders) were made in a manner that they purport to have been made by authority of one who did not give authority (United States Postal Service). Ind. Code § 35-43-5-2(a)(2)(D); Appellant's App. at 9. To the extent Stewart relies upon his

forthrightness as evidence of his innocence, we point out that the jury was free to infer otherwise. That is, the jury heard that initially Stewart was not prosecuted for the Merchant's Bank incident during which he acted cooperatively and contritely. Thus, the jurors could reasonably conclude that Stewart's willingness to provide contact information during the Aurora Post Office incident may have been a purposeful attempt to throw off suspicion once more.

The evidence presented at trial, which we have already set out *supra*, convinces us that the State demonstrated sufficient evidence of Stewart's knowledge and/or intent in regard to the counterfeiting conviction.[3]

### *II. Proportionate Penalty*

Stewart faults the State for "over charging" him and faults the legislature for attaching a more severe penalty to presenting a forged document than to the underlying crime of theft. Appellant's Br. at 10. He notes that had he successfully cashed the counterfeit money orders, i.e. caused actual loss, Stewart would have been guilty of theft, which would have been only a class D felony. Stewart contends that in his case, forgery has a "lesser burden of proof" than theft, yet carries a higher penalty. *Id*. at 11. Accordingly, Stewart argues that his convictions for forgery, class C felonies, violate the proportionality clause of the Indiana Constitution where his actions constitute no more than attempted thefts, class D felonies. *Id*. at 9.

Many years ago, our supreme court found a similar over charging argument

[3] Having vacated the attempted theft convictions and sentences, we do not address the sufficiency or sentencing arguments concerning those two charges.

unpersuasive:

> It has long been settled that it is the province of the Legislature to define criminal offenses and to set the penalties for such criminal offenses. There are many factual situations where a charge could be brought under one of several different statutes. Indeed, on some occasions, charges have been brought in alternative counts with the different counts being based upon different criminal statutes. It is sufficient if the indictment or affidavit charges and the evidence proves an offense under a statute, even though the charge might have been brought under a different statute providing a lesser penalty.

*Durrett et al. v. State*, 247 Ind. 692, 696-97, 219 N.E.2d 814, 816-17 (1966). Utilizing the same rationale, we are equally unconvinced by Stewart's over charging argument. His sentence is as prescribed by the statute upon which the conviction was rendered. Thus, the prosecutor did not abuse the discretion afforded him in deciding which crimes to prosecute.

As for Stewart's constitutionality claim, the State responds that because he failed to raise it at trial or sentencing, he has waived the issue. However, "a party may raise the issue of a statute's constitutionality at any stage of a proceeding[.]" *Poling v. State*, 853 N.E.2d 1270, 1274 n.3 (Ind. Ct. App. 2006). Indeed, this Court may raise the issue sua sponte. *Id*.

We have repeatedly observed that the legislature has the primary responsibility for determining the appropriate penalties for crimes committed in this state. *See, e.g., State v. Moss-Dwyer*, 686 N.E.2d 109, 111 (Ind. 1997). Our review of legislative prescriptions of punishment is highly restrained and very deferential. *Id*. "When considering the constitutionality of a statute, we begin with the presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional." *Person v. State*, 661 N.E.2d 587, 592 (Ind. Ct. App. 1996), *trans.*

*denied*; *see also Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007).

Article 1, Section 16 provides: "All penalties shall be proportioned to the nature of the offense." We are not at liberty to set aside a legislatively sanctioned penalty merely because it seems too severe. *Moss-Dwyer*, 686 N.E.2d at 112. A criminal penalty violates the proportionality clause "'only when a criminal penalty is not graduated and proportioned to the nature of the offense.'" *Conner v. State*, 626 N.E.2d 803, 806 (Ind.1993) (quoting *Hollars v. State*, 259 Ind. 229, 236, 286 N.E.2d 166, 170 (1972)). Stated more precisely, a sentence violates the proportionality clause where it is so severe and entirely out of proportion to the gravity of offense committed as "'to shock public sentiment and violate the judgment of a reasonable people.'" *Pritscher v. State*, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996) (quoting *Cox v. State*, 203 Ind. 544, 549, 181 N.E. 469, 472 (1932)).

While we appreciate Stewart's opinion about which crimes are more serious or more deserving of higher felony classifications, such an argument should be directed to the legislature. Applying the appropriate highly restrained and very deferential standard of review, we cannot conclude that designating forgery to be a higher-level felony than theft/attempted theft under certain situations is too severe or not proportioned to the nature of the offenses. In short, Stewart has not met the high burden of demonstrating that the penalties currently assigned by the legislature to these particular crimes are so out of proportion to the gravity of the offenses as to shock public sentiment or violate the judgment of reasonable people. Thus, his constitutional argument fails.

### *III. Appellate Rule 7(B)*

Citing Indiana Rule of Appellate Procedure 7(B), Stewart maintains that his sentence

was inappropriate. Specifically, he argues that his criminal history included "merely" driving offenses and convictions from many years back when he "was barely an adult." Appellant's Br. at 17. In addition, he offers his "harsh" childhood as some explanation for his less-than-clean record. *Id.* He focuses upon the lack evidence that he was a problem prisoner while incarcerated for 135 days during the pendency of his case and characterizes his crimes as "victimless." *Id.* at 18.

Indiana Rule of Appellate Procedure 7(B) states: "The 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." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied.*

In its sentencing order, the court explained its reasoning:

> The Court, having heard the evidence, now finds that [Stewart] presented mitigating factors of a very difficult childhood in which he and other families were victimized by his father. However, these circumstances are outweighed by [Stewart's] criminal history which includes three (3) prior unrelated felony convictions and a juvenile adjudication for forgery demonstrating that [Stewart] is a risk to re-offend and the Court finds the criminal history to be an aggravating circumstance that outweighs the mitigating circumstances and sentences [Stewart] as follows: . . .

App. at 124.

We discern the nature of the offenses from the evidence presented at trial. As set forth

*supra*, within the span of seven months, Stewart possessed not one, but twelve counterfeit money orders. After the first one was presented and found to be fake, Stewart waited some time before presenting another one, and when he did present the next one for payment, he did so at a different location. The money orders were not obviously phony; indeed, the receiving postal clerk forwarded the one she handled to her boss for examination. The money orders were elaborate enough that it took someone specially trained, i.e., Postmaster, to make the determination that they were fake. Had Stewart cashed all the counterfeit money orders, he would have unlawfully gained more than $4500.

Regarding Stewart's character, we look at his criminal history. Our supreme court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). "[T]he significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary 'based on the gravity, nature and number of prior offenses as they relate to the current offense.'" *Prickett v. State*, 856 N.E.2d 1203, 1209 (Ind. 2006) (quoting *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004)).

Stewart's criminal history consists of a 1991 juvenile adjudication for forgery, a 1991 forgery conviction as an adult, a 1993 receiving stolen property conviction, a 1994 driving while suspended conviction, a 2004 operating while suspended conviction, and a 2004

receiving stolen property conviction. Of those offenses, three were felonies, and four may be considered crimes of dishonesty – similar or identical to the current offenses.

Weighing against the significant criminal history is Stewart's traumatic childhood. While we are sympathetic to Stewart for what he endured as a child, the court was not required to assign this mitigator as much weight as he may have hoped. *See Kelly v. State*, 719 N.E.2d 391, 395 (Ind. 1999) (noting that it is within trial court's discretion to determine whether mitigating circumstances are significant and what weight to accord to identified circumstances); *cf. Page v. State*, 615 N.E.2d 894, 896 (Ind. 1993) ("Evidence of a troubled childhood does not require the trial court to find it to be a mitigating circumstance.").[4]

In conclusion, given the nature of the circumstances and Stewart's character, we cannot say that enhanced, but concurrent,[5] sentences were inappropriate. Therefore, we will not revise the eight-year total sentence for his convictions for two class C felonies and one class D felony.

Affirmed in part and vacated in part.

BAKER, C. J., and FRIEDLANDER, J., concur.

[4] Indeed, recent state supreme court precedent goes so far as to say that the relative weight or value assignable to reasons properly found is not available for review. *See Anglemyer v. State*, 868 N.E.2d 482, 491, 493 (Ind. 2007).

[5] The court could have ordered the terms served consecutively, which, even after vacating the attempted theft convictions, would have resulted in a nineteen-year sentence.