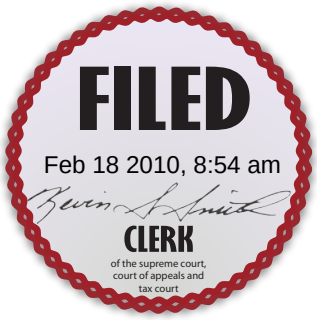

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IN THE
COURT OF APPEALS OF INDIANA

MARVIN SMITH,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 49A05-0905-CR-256
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Jones, Judge *Pro Tempore*
Cause No. 49G05-0812-FC-271436

February 18, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

CASE SUMMARY[1]

Appellant/Defendant Marvin Smith appeals following his convictions of and sentences for Class C felony Robbery,[2] Class D felony Criminal Recklessness,[3] and Class A misdemeanor Failure to Stop After an Accident Resulting in Personal Injury[4] and the finding that he is a habitual offender. Smith contends that the State produced insufficient evidence to support a jury finding that the person who allegedly robbed the CVS actually took any property, which is necessary to prove robbery. Smith also contends that the State produced insufficient evidence to sustain a finding that he was the person who allegedly robbed the CVS, citing inconsistencies in witness descriptions and a lack of physical evidence tying him to the scene. Finally, Smith contends that his sentence was inappropriately harsh in light of his character and the nature of his offenses. We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

At approximately 11:30 a.m. on November 25, 2008, an African-American male wearing a black hooded sweatshirt, black hat, and sunglasses handed a note to Kristina Refshammer, a pharmacy technician at CVS drugstore at Shelby and Raymond in Indianapolis. The note read, "ROBBERY Tussionex Suspension Xanax 2 mg Norco

[1] We heard oral argument in this case on February 2, 2010, at Lawrence North High School in Indianapolis. We wish to extend our gratitude for the hospitality of the students, staff, and faculty of Lawrence North and commend counsel for the high quality of their oral advocacy.

[2] Ind. Code § 35-42-5-1 (2008).

[3] Ind. Code § 35-42-2-2 (2008).

[4] Ind. Code § 9-26-1-1 (2008).

1000 mg I have a gun Don't Be Dumb[.]" Ex. 5. Tussionex, Xanax, and Norco are all controlled substances. Refshammer handed the note to Teresa Harris, who handed it to pharmacy technician Chris Crowe, who handed it to pharmacist Rebecca Holbrook. Crowe saw Holbrook gather the requested medications and walk to the pickup window and the suspected robber leave shortly thereafter, but did not actually see the medications in his possession at any point.

Brenda Fox, the CVS store manager, followed the suspected robber out of the store and saw him run into a nearby alley from which soon emerged a black car. When Indianapolis Metropolitan Police Lieutenant Brad McFerran arrived, Fox said "black car" and pointed south down Shelby Street. Tr. p. 276. Lieutenant McFerran drove south on Shelby and soon saw a black vehicle that "appeared to be traveling at a high rate of speed" on a cross-street. Tr. p. 278. Lieutenant McFerran eventually lost sight of the black vehicle.

Shortly thereafter, Mark Monckton was sitting in his house at 1332 East LeGrande Avenue with his fiancée Dawn Evans, who had been paralyzed below the waist the year before and was confined to a wheelchair. Monckton heard a vehicle driving down LeGrande at a high rate of speed. Seconds later, a black vehicle crashed into the front of the home, knocking Evans over in her wheelchair and bloodying her face. The driver fled. When Indianapolis Metropolitan Police Officer Richard Hemphill arrived at the scene of the collision, bystanders directed him to nearby bushes, where Smith was soon found hiding. At show-ups at the scene, both Crowe and Fox identified Smith as the

person who had been in the CVS, and Monckton identified him as the driver of the vehicle that had crashed into his home.

On December 2, 2008, the State charged Smith with Class C felony robbery, Class D felony criminal recklessness, and Class A misdemeanor failure to stop after an accident resulting in personal injury, and later with being a habitual offender. On March 24, 2009, a jury found Smith guilty as charged. On April 14, 2009, the trial court sentenced Smith to six years of incarceration for robbery (enhanced by ten years by virtue of his habitual offender status), two years for criminal recklessness, and one year for failure to stop after an accident. The trial court ordered that the sentences for criminal recklessness and failure to stop after an accident be served concurrent with one another but consecutive to the robbery sentence and that, of the resulting aggregate eighteen-year sentence, six years would be suspended, two of those to probation. The trial court found, as aggravating circumstances, the number of victims and that the disabled Evans was injured when Smith drove into Monckton's home. The trial court found the hardship on Smith's two children and his mother to be mitigating circumstances.

DISCUSSION

I. Whether the State Produced Sufficient Evidence to Sustain Smith's Conviction for Class C Felony Robbery

Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences

> drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted). Indiana Code section 35-42-5-1 provides, in part, that "A person who knowingly or intentionally takes property from another person or from the presence of another person … by using or threatening the use of force on any person; or … by putting any person in fear … commits robbery, a Class C felony."

A. Identity

Smith contends that the State failed to produce sufficient evidence to sustain a finding that he was the person who robbed the CVS. Smith argues that eyewitness descriptions of the alleged robber were "significantly inaccurate," points to inconsistencies in eyewitness testimony, and notes that no physical evidence linked him to the crime. Crowe and Fox, however, positively identified Smith as the person who had allegedly robbed the CVS, and the jury was entitled to believe them. Smith's argument in this regard is an invitation to reweigh the evidence, one that we decline.

B. Asportation

Smith also contends that the State failed to prove that any property was actually taken from the CVS. It is well-settled that "[t]o constitute robbery there must be an asportation." *Neal v. State*, 214 Ind. 328, 341, 14 N.E.2d 590, 596 (1938) (citation omitted). "In other words, it must appear that the property was taken from the possession of the victim into that of the robber." *Id*., 14 N.E.2d at 596 (citation omitted). Smith

points to a lack of direct evidence that he actually ever took possession of the drugs that the pharmacist prepared for him.

"When a verdict rests on circumstantial evidence, the State need not overcome every reasonable hypothesis of innocence. Rather, circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt." *Kriner v. State*, 699 N.E.2d 659, 663 (Ind. 1998) (citing *Saylor v. State*, 686 N.E.2d 80, 84 (Ind. 1997)). "In this review, we do not reweigh the evidence or assess the credibility of witnesses." *Id.* "Circumstantial evidence by its nature is a web of facts in which no single strand may be dispositive. In a prosecution based on circumstantial proof, the evidence in the aggregate may point to guilt where individual elements of the State's case might not." *Id*. at 664.

Smith is correct that the State presented no direct evidence that he ever asported the medications from the CVS. Moreover, we agree with Smith that the State produced insufficient circumstantial evidence to support a conclusion that Smith did so. The State presented evidence that Smith handed a robbery demand note to a pharmacy technician, that the pharmacist collected the requested medications, and that Smith left shortly after the pharmacist walked to the counter with the medications. There is no evidence, however, that the pharmacist returned empty-handed or that any of the collected drugs were missing from the CVS, and police never found drugs on Smith's person, in the vehicle he was driving, or along known sections of his escape route. As a whole, the evidence fails to support a conclusion that Smith asported the drugs from the CVS.

Smith, however, is not entitled to an outright reversal of his robbery conviction. It is clear that the evidence establishes the crime of attempted robbery. Indiana Code section 35-41-5-1(a) (2008) provides, in part, as follows:

> A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted.

So, even if Smith never actually received the medications from CVS, there is evidence that he handed the demand note to Refshammer, which is certainly a substantial step toward the commission of robbery.

Attempted robbery is an inherently-included offense of robbery. *See* Ind. Code § 35-41-1-16 (2008) ("'Included offense' means an offense that … consists of an attempt to commit the offense charged or an offense otherwise included therein[.]"). When a defendant has been convicted of an offense and the evidence only establishes that he has committed an inherently-included offense, the proper remedy is to remand for entry of judgment of conviction for the included offense. *See Nunn v. State*, 601 N.E.2d 334, 339 (Ind. 1992) ("On appeal, this Court may order a modification of a conviction judgment to that of a lesser included offense because of an insufficiency of evidence on a particular element of the crime.").

Moreover, this remedy does not violate Smith's due process rights, even though Smith was not charged with attempted robbery. In *Ledesma v. State*, 761 N.E.2d 896 (Ind. Ct. App. 2002), we addressed the question of whether it violated due process to convict one of attempted murder when he had only been charged with murder. We

concluded that such a conviction did not violate due process, reasoning that "[b]ecause Indiana Code § 35-41-1-16(2) defines an attempt to commit a crime charged as a lesser included offense of the completed crime, [the defendant] was given fair notice when charged with murder that he would have to defend against the charge of attempted murder." *Id*. at 900. So, even though we determine that the State failed to establish that Smith committed Class C felony robbery, we remand for entry of judgment of conviction for Class C felony attempted robbery and order that Smith's sentence be six years of incarceration for attempted robbery (enhanced by ten years by virtue of his habitual offender status), to be served consecutive to his sentences for criminal recklessness and failure to stop after an accident. These instructions will produce the same aggregate sentence that Smith received originally.

II. Whether Smith's Sentence is Inappropriate

Smith contends that his eighteen-year sentence is inappropriately harsh.[5] We "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." Ind. Appellate Rule 7(B). "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

[5] Smith could have potentially received a sentence of eight years of incarceration for robbery (enhanced by a maximum of twelve years by virtue of his habitual offender status), three years for criminal recklessness, and one year for failure to stop after an accident. *See* Ind. Code §§ 35-50-2-6 (2008); 35-50-2-7 (2008); 35-50-3-2 (2008); 35-50-2-8(h) (2008). Consequently, the maximum aggregate sentence the trial court could have imposed was twenty-four years of incarceration.

are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

A. Smith's Character

Smith's criminal record does not speak well of his character. Smith, who was twenty-three years old at the time of these offenses, had a juvenile record consisting of what would have been Class A misdemeanor battery, Class B felony burglary, and Class D felony theft if committed by adults. (Green App. 3-4). As an adult, Smith has prior convictions for Class C misdemeanor alcohol possession by a minor, Class C felony burglary, and Class D felony resisting law enforcement.[6] (Green App. 3-4, Appellant's App. 40). Smith's criminal record clearly reveals a pattern of generally increasing severity, culminating in the instant crimes.

On the other hand, several persons testified on Smith's behalf at sentencing, describing his good character traits. His mother described Smith as a good son and father to his two children. (Tr. 527). Smith's girlfriend, and the mother of his children, testified that he had worked diligently to support them and that he shared responsibility for raising them. (Tr. 531). Evidence that Smith was devoted to his family and long-time girlfriend tends to do him credit. On the whole, however, Smith's character, specifically as revealed by his criminal record, justifies an enhanced sentence.

B. The Nature of Smith's Offenses

[6] The two adult felony convictions formed the basis for the habitual offender finding. The court observes that being adjudged a habitual offender at the age of twenty-three is a very sad milestone.

The nature of Smith's offenses was, in general, worse than that of typical examples of those crimes. Smith's attempted robbery involved several victims, including three pharmacy technicians, the pharmacist, and the store manager of the CVS. Moreover, Smith's flight from police involved driving at a high rate of speed through a largely residential area, ending when he crashed his car into Monckton's home. The impact knocked Evans, a paraplegic, over in her wheelchair and bloodied her face while causing extensive damage to the house. Even though there is nothing in Smith's flight from the scene on foot that indicates that offense was any more egregious than is typical, the more egregious nature of his other two crimes also justifies an enhanced sentence. Under the circumstances, Smith has failed to convince us that his eighteen-year sentence is inappropriate in light of his character and nature of his offenses.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

DARDEN, J., and BARNES, J., concur.