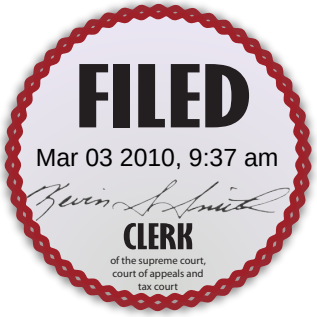

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IN THE
COURT OF APPEALS OF INDIANA

ZACHARY GOOTEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 67A05-0904-CR-194
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0705-FC-53

MARCH 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Zachary Gootee appeals from his convictions and sentences for four counts of forgery, all Class C felonies; three counts of fraud, all Class D felonies; one count of theft, a Class D felony; and a determination that he is a habitual offender. We affirm in part, reverse in part, and remand for further proceedings.

ISSUES

Gootee raises three issues for review, which we restate as:

I. Whether the trial court abused its discretion by admitting certain evidence.

II. Whether the evidence is sufficient to support Gootee's convictions.

III. Whether Gootee's sentence is erroneous.

FACTS

On Friday, December 1, 2006, at shortly after 2:00 p.m., Gootee came to Ruth Stanger's home in Putnam County, Indiana. Stanger was ninety-two (92) and legally blind. Gootee said that he had run out of gas and asked to use Stanger's phone. Stanger allowed Gootee to enter her home. At that time, Stanger's purse, which contained her debit card and a piece of paper with the card's Personal Identification Number, was visible from the kitchen telephone. Gootee tried to use the kitchen phone but stated that it did not appear to be working. At Gootee's request, Stanger retrieved a cordless phone from her bedroom. Gootee tried to use it, reported that it also appeared to be malfunctioning, and left.

At 4:32 p.m. that same day, Gootee used Stanger's debit card to remove $202 from an Automatic Teller Machine ("ATM") at a Shell station in Greencastle, Putnam

County. On December 2, 2006, at 12:14 and 12:15 a.m., Gootee returned to the ATM at the Shell station and made two (2) withdrawals of $202 each using Stanger's card. On the same day, at 9:16 p.m., Gootee went to the Country Cork and Cap, a liquor store located in Bainbridge, Putnam County, and used Stanger's card to purchase a twelve-pack of beer for $10.00.

Later that evening, around midnight, Gootee, his girlfriend, and their baby arrived at Richard Stedman's home on the west side of Indianapolis. Gootee stayed with Stedman for several days. On the morning of December 4, 2006, Gootee and Stedman went to a Meijer store on the west side of Indianapolis, in Marion County, and Gootee purchased a television set for $760.18 using Stanger's card.

Later in the day on December 4, 2006, Stanger's bank noticed the withdrawals and charges on her debit card and contacted her about the account activity. At that time, Stanger realized her purse was missing and had the bank block the card from further use.

The State charged Gootee with the crimes identified above for his theft and misuse of Stanger's debit card in Putnam County. A jury found Gootee guilty as charged. The trial court sentenced Gootee to serve ten (10) years for each class C felony conviction, to be served concurrent with one another, four (4) years for each Class D felony conviction, to be served concurrent with one another and consecutive to the Class C felony convictions, plus ten (10) years for the habitual offender determination, for a total sentence of twenty-four (24) years.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE

Gootee argues that the trial court violated Indiana Evidence Rule 404(b) by admitting evidence of Gootee's use of Stanger's debit card to buy a television at a Meijer store in Marion County shortly after he committed the crimes at issue.

We review the trial court's ruling on the admission of evidence for an abuse of discretion. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Indiana Evidence Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Pursuant to this rule, evidence is excluded only when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. *Herrera v. State*, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999). In assessing the admissibility of evidence under Evidence Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403.

Wilhelmus v. State, 824 N.E.2d 405, 414 (Ind. Ct. App. 2005). This Court employs the same test when determining whether the trial court abused its discretion. *Id.*

In this case, Gootee contended that he was not the person who had stolen Stanger's card and committed the charged offenses in Putnam County. On December 1 and 2, 2006, Gootee was captured on security videotape withdrawing funds from an ATM at a Shell station in Greencastle, Putnam County. The State also introduced evidence, in the form of two witnesses' testimony and a security tape, which showed that on December 4, 2006, Gootee had used Stanger's card to purchase a television at a Meijer store in Marion County. The evidence of the television purchase at Meijer tends to show that Gootee had kept Stanger's card in his possession since the time of the theft on December 1, 2006, and was the person who had committed the charged offenses on December 1 and 2, 2006. Thus, the evidence of the subsequent television purchase in Marion County was relevant to provide identity. *See Wilhelmus*, 824 N.E.2d at 415.

Furthermore, the probative value of the evidence of Gootee's illegal purchase of the television outweighed any unfair prejudicial effect. The evidence was crucial to discovering Gootee's identity, and Gootee's purchase of the television occurred only two (2) days after the crimes at issue were committed. *See id*. Thus, the trial court did not abuse its discretion in admitting evidence that Gootee had used Stanger's debit card to purchase a television in Marion County.

II. SUFFICIENCY OF THE EVIDENCE

Our standard of review for sufficiency of the evidence is well settled. We neither reweigh the evidence nor judge the credibility of witnesses. *Whitlow v. State*, 901 N.E.2d 659, 660 (Ind. Ct. App. 2007). Rather, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. *Id.* at 660-661. We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* at 661.

Gootee contends that his convictions for fraud, forgery, and theft cannot be sustained because the State charged him with stealing and misusing Stanger's credit card when, in fact, Stanger's debit card was stolen and misused. This contention is, in substance, an allegation that there is a fatal variance between the charging information and the evidence submitted at trial.

A variance is an essential difference between proof and pleading. *Reinhardt v. State*, 881 N.E.2d 15, 17 (Ind. Ct. App. 2008). Not all variances, however, require reversal and as a general proposition, failure to make a specific objection at trial waives any material variance issue. *Id.* To determine whether a variance is deemed fatal, we consider: (1) whether the defendant was misled by the variance in the preparation and maintenance of his or her defense, and was harmed or prejudiced thereby; and (2) whether the defendant will be protected against double jeopardy in a future criminal proceeding covering the same events, facts, and evidence. *See Childers v. State*, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004).

In this case, during trial Gootee presented evidence on the difference between a credit card and a debit card, but he did not object to the variance between the charging

information and the evidence submitted at trial. Therefore, he has waived this claim. *See Childers*, 813 N.E.2d at 436. Waiver notwithstanding, Gootee does not explain how he was misled or prejudiced by the variance, and we find no error. *See id.*

Gootee also contends that there is insufficient evidence to support one of his convictions for forgery because the State failed to show that he was the person who used Stanger's debit card to make a purchase at Country Cork and Cap.

In order to obtain a conviction for forgery, the State had to prove beyond a reasonable doubt that Gootee (1) with intent to defraud (2) made, uttered, or possessed a written instrument (3) in such a manner that it purported to have been made (4) by another person, at another time, with different provisions, or by authority of one who did not give authority. *See* Indiana Code § 35-43-5-2.

In this case, Stanger's debit card was used to purchase $10.00 worth of merchandise from Country Cork and Cap in Bainbridge, Putnam County, on December 2, 2006, at 9:16 p.m. A security tape shows Gootee using Stanger's card earlier that same day to withdraw money from an ATM at a Shell station in Greencastle, Putnam County. A clerk at the Country Cork and Cap remembered seeing Gootee in the store, although he could not remember the exact date Gootee was there. The clerk also stated that the only merchandise that could have been purchased for $10.00 was a twelve-pack of beer on sale, because no other merchandise, with tax, would cost exactly $10.00. Finally, when Gootee arrived at Richard Stedman's home at around midnight on the same day, Gootee brought beer with him. This evidence is sufficient to demonstrate that Gootee, with intent to defraud, used Stanger's debit card at the Country Cork and Cap to purchase

merchandise in such a manner that it purported to have been authorized by Stanger. Therefore, the evidence is sufficient to sustain this conviction. *See McHenry v. State*, 820 N.E.2d 124, 127 (Ind. 2005) (determining that the evidence was sufficient to affirm a conviction for forgery based on circumstantial evidence that the appellant bank teller had withdrawn funds from a customer's account when no customer was present at the teller's window).

III. SENTENCING

Gootee argues that the trial court erred by failing to find mitigating circumstances that were supported by the record. Specifically, Gootee argued at sentencing that he had a drug dependency problem when he committed these crimes and that he was raised in an unstable family environment where drug and alcohol abuse were prevalent.

At the outset, we note that because the offenses in this case were committed after the April 25, 2005, revisions to the sentencing statutes, we review Gootee's sentence under the advisory sentencing framework. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *modified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* (quotation omitted).

Although a sentencing court must consider all evidence of mitigating factors presented by a defendant, the court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Hape v. State*, 903 N.E.2d 977, 1000 (Ind. Ct. App. 2009), *transfer denied*. We will conclude that a trial court abused its discretion by failing to find a mitigating circumstance if the defendant establishes "that the mitigating evidence is both significant and clearly supported by the record." *See id*. With regard to substance abuse, while we have recognized that a history of substance abuse may be a mitigating circumstance, we have held that when a defendant is aware of a substance abuse problem but has not taken appropriate steps to treat it, the trial court does not abuse its discretion by rejecting the addiction as a mitigating circumstance. *Hape*, 903 N.E.2d at 1002.

Here, Gootee, who was thirty years old at trial, told the trial court that he has an extensive history of substance abuse, which started when he was "about twelve." Tr. p. 207. However, Gootee failed to assert that he has sought treatment. In light of Gootee's lengthy history of substance abuse and failure to provide any evidence that he has sought treatment for his problem, the trial court did not abuse its discretion in failing to recognize Gootee's substance abuse as a mitigating circumstance. *See id.*

Turning to Gootee's claim that his unstable childhood was a mitigating factor, our supreme court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight. *See Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000), *cert. denied*, 542 U.S. 1057, 122 S.Ct. 649, 151 L.Ed.2d 566 (2001). Gootee argued at sentencing that he did not have a relationship with his father as a child and that his

mother and brother both had substance abuse problems, but he did not present any evidence that his troubled childhood was related to the instant offenses. Thus, the trial court did not abuse its discretion by failing to find Gootee's troubled childhood to be a mitigating factor. *See Rose v. State*, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004) (determining that the trial court did not err by failing to identify appellant's troubled childhood as a mitigating factor).

Although Gootee's sentencing claims are without merit, the State presents its own sentencing claims. The State contends that Gootee's total sentence exceeded statutory limits. For a Class C felony, the maximum sentence is eight (8) years. *See* Indiana Code § 35-50-2-6. For a Class D felony, the maximum sentence is three (3) years. *See* Indiana Code § 35-50-2-7.

In this case, for Gootee's four convictions for forgery as Class C felonies, the trial court sentenced Gootee to ten (10) years each, in violation of Indiana Code § 35-50-2-6. For Gootee's three convictions for fraud and one conviction for theft, all as Class D felonies, the trial court sentenced Gootee to four (4) years each, in violation of Indiana Code § 35-50-2-7. The case must be remanded so that the trial court can resentence Gootee in accordance with the statutory limits.

The State also asserts that the trial court's order is erroneous with respect to the habitual offender enhancement. A habitual offender finding does not constitute a separate crime nor result in a separate sentence, but rather results in a sentence enhancement imposed upon the conviction of a subsequent felony. *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997). In the event of simultaneous multiple felony convictions

and a finding of habitual offender status, the trial court must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced. *Id.* In this case, the trial court imposed a separate sentence for the habitual offender determination rather than enhancing the sentence for one of his felony convictions. This was erroneous, and on remand the trial court must specify the conviction to which the habitual offender enhancement applies. *See Reffett v. State*, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006) (remanding for resentencing where the trial court failed to specify which sentence was enhanced by the habitual offender determination).

Affirmed in part, reversed in part, and remanded for resentencing consistent with this opinion.

NAJAM, J., and ROBB, J., concur.