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IN THE
COURT OF APPEALS OF INDIANA

KENDRA SMITH,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 03A05-0911-CR-641
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Kathleen Tighe Coriden, Judge
Cause No. 03D02-0904-CM-378

May 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial at which she appeared without counsel, Kendra Smith was convicted of two counts of conversion, Class A misdemeanors. Smith appeals and raises two issues for our review, which we restate as: 1) whether Smith knowingly, voluntarily, and intelligently waived her right to counsel; and 2) whether sufficient evidence supports her convictions. We conclude Smith did not knowingly, voluntarily, and intelligently waive her right to counsel, and although the State presented sufficient evidence to support a conviction on Count I, it failed to present sufficient evidence to support a conviction on Count II. We therefore reverse both convictions and remand for a new trial on Count I with instructions to vacate Count II.

Facts and Procedural History

The State charged Smith with two counts of conversion, Class A misdemeanors, by alleging that on March 26, 2009, Smith pumped gas without paying for it at a Murphy's USA gas station and took merchandise from a Circle K or Wal-Mart store without paying for it. Smith failed to appear at an initial hearing scheduled for April 29, 2009, and a warrant was issued for her arrest.

On June 8, 2009, the trial court held an initial hearing at which Smith appeared, pled not guilty, and requested appointment of a public defender. The trial court made the following case chronology entry:

> Defendant informed of his/her rights and the charges filed. . . . The court sets this matter for pre-trial July 29, 2009 at 1:30 p.m. and for bench trial on August 26, 2009 at 10:00 a.m. Defendant given questionnaire for public defender – must be returned by 6/10/2009. Hearing for a public defender set for June 15, 2009 at 8:00 a.m.

Appellant's Appendix at 5.[1] On June 15, 2009, Smith failed to appear at the indigency hearing, and she did not return the public defender questionnaire. The trial court ruled that Smith's request for a public defender would be denied. On July 29, 2009, the trial court held a pretrial conference at which Smith appeared without counsel.

On August 26, 2009, a bench trial was held at which Smith appeared without counsel and the trial court made no inquiry or comment on the record regarding the fact Smith was unrepresented by counsel. The trial court found Smith guilty as charged and, on October 7, 2009, sentenced her to two years in jail, suspended, with one year on probation. Smith now appeals.

Discussion and Decision

I. Waiver of Right to Counsel

The United States and Indiana constitutions guarantee a criminal defendant the right to assistance of counsel at trial. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his [or her] ability to assert any other rights he [or she] may have." Poynter v. State, 749 N.E.2d 1122, 1125-26 (Ind. 2001) (quotation omitted). "The right to counsel can only be relinquished by a knowing, voluntary, and intelligent waiver of the right." Dowell v. State, 557 N.E.2d 1063, 1065-66 (Ind. Ct. App. 1990), trans. denied, cert. denied, 502 U.S. 861 (1991). In cases such as this where the defendant proceeds to trial without counsel, the State bears the "heavy burden" of

[1] As no transcript of the initial hearing has been made part of the appellate record, the chronological case summary is our only source of information regarding what transpired at the initial hearing.

proving a valid waiver, which will not be inferred from a silent record. Fitzgerald v. State, 254 Ind. 39, 47, 257 N.E.2d 305, 311 (1970).

Acknowledging the absence of any verbal or written waiver in this case, the State argues Smith effected a waiver by her conduct. That is, the State contends Smith's failure to appear at the indigency hearing or return the public defender questionnaire represents a knowing and voluntary refusal "to follow the basic procedural steps necessary to have [] an attorney appear on her behalf," such that "her Sixth Amendment right to counsel was effectively waived." Brief of Appellee at 5. However, the State does not cite, and we have not discovered, any case specifically addressing whether a defendant's failure to appear at an indigency hearing can reflect a knowing, voluntary, and intelligent waiver of the right to counsel. Cf. Carr v. State, 591 N.E.2d 640, 641 (Ind. Ct. App. 1992) (holding a defendant does not waive the right to jury trial by failing to appear at trial, and citing Marcum v. State, 509 N.E.2d 895, 896-97 (Ind. Ct. App. 1987), which held defendant's failure to appear at pretrial conference did not waive his right to jury trial).

Our supreme court has provided general guidance for determining in what circumstances a defendant's conduct effects a knowing, voluntary, and intelligent waiver of the right to counsel, instructing us to look to four factors: "(1) the extent of the [trial] court's inquiry into the defendant's decision [to proceed without counsel], (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant,

and (4) the context of the defendant's decision to proceed *pro se*."[2] Poynter, 749 N.E.2d at 1127-28 (quoting United States v. Hoskins, 243 F.3d 407, 410 (7th Cir. 2001)); see also Kubsch v. State, 866 N.E.2d 726, 736 (Ind. 2007), cert. denied, 128 S. Ct. 2501 (2008). In Poynter, the trial court gave Poynter a standard advisement regarding the right to counsel but did not advise him of the dangers and disadvantages of self-representation, Poynter indicated an intention to hire an attorney prior to trial but appeared at pretrial conference and trial without an attorney, Poynter's failure to hire an attorney "did not result in gross delays or clearly appear to intend manipulation of the process," 749 N.E.2d at 1128, and the trial court made no finding regarding whether Poynter knowingly or voluntarily elected to proceed pro se. In these circumstances, the record did not establish a knowingly, voluntarily, and intelligent waiver of the right to counsel. Id. at 1129. Reaching a different result in Jackson v. State, 868 N.E.2d 494 (Ind. 2007), our supreme court noted Jackson initially retained counsel and appeared with counsel at pretrial conferences, but thereafter discharged his attorneys and failed to appear at the final two pretrial conferences or his jury trial, despite having told the court he would retain new counsel. At no time did Jackson indicate to the court that he could not afford to hire another attorney. The trial court found Jackson knew of his trial date and knowingly and voluntarily failed to appear. Our supreme court held Jackson's conduct established a knowing, voluntary, and intelligent waiver of his right to counsel. Id. at 499.

[2] Under the fourth factor, we consider "whether the defendant's decision appears tactical or strategic in nature or seems manipulative and intending delay." Poynter, 749 N.E.2d at 1128 n.6.

Here, as in Poynter, the record does not establish Smith knowingly, voluntarily, and intelligently waived her right to counsel. Although Smith was generally informed of her trial rights at the initial hearing, the record does not show she was advised of the dangers and disadvantages of proceeding without counsel. Nothing in the record reflects Smith was otherwise aware of those dangers and disadvantages. Despite her appearance without counsel at the pretrial conference and bench trial, the trial court did not inquire whether Smith made a knowing and voluntary choice to proceed without counsel. At the initial hearing, Smith requested a public defender. Her failure to appear at the indigency hearing or return the public defender questionnaire, while it may reflect a change of mind regarding her request for appointed counsel, was not equivalent to a clear request to proceed pro se. Rather, the record is silent regarding whether Smith wished to represent herself or intended to hire an attorney but was unable to do so before the pretrial conference or the trial date, when on both occasions she appeared without an attorney. The trial court at this point should have advised Smith on the dangers and disadvantages of self-representation, and the lack of any such advisement "weighs heavily against finding a knowing and intelligent waiver." Poynter, 749 N.E.2d at 1128. In Poynter, the failure to give an advisement was dispositive even though Poynter never requested a public defender. See id. at 1124-25; id. at 1127 (citing waiver by conduct cases where an effective waiver "invariably included evidence of an admonition to the defendant on the dangers and disadvantages of self-representation"). The same is true here: Smith's failure to return the public defender questionnaire was not an effective waiver given the trial court's failure to advise Smith on the hazards of proceeding pro se.

Although some delay is attributable to Smith due to her failure to appear at the originally scheduled initial hearing and the indigency hearing, Smith's appearance at trial without counsel does not clearly appear to be a strategic choice, and her conduct did not result in gross delay or reflect a clearly manipulative intention. Finally, the trial court made no finding regarding whether Smith knowingly, voluntarily, or intelligently elected to forego her right to counsel. For all of the foregoing reasons, we conclude Smith did not knowingly, voluntarily, and intelligently waive her right to counsel, and her convictions are therefore reversed.

II. Sufficiency of the Evidence

Although we have reversed Smith's convictions because there was no valid waiver of counsel, we address Smith's sufficiency claim because it bears on whether the State may retry Smith on these charges. See Slayton v. State, 755 N.E.2d 232, 237 (Ind. Ct. App. 2001). As is well settled, when reviewing the sufficiency of the evidence to support a conviction, we neither reweigh the evidence nor judge the credibility of witnesses. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We consider only the evidence and reasonable inferences supporting the verdict, and we will conclude the evidence is sufficient "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quotation omitted).

To convict Smith of conversion as a Class A misdemeanor, the State must prove beyond a reasonable doubt Smith "knowingly or intentionally exert[ed] unauthorized control over property of another person." Ind. Code § 35-43-4-3(a). Although the charging information has not been included in the appellate record, the parties agree

Count I alleged Smith knowingly or intentionally exerted unauthorized control over property of a Murphy's USA gas station, and Count II alleged the same with respect to property of Circle K or Wal-Mart. Smith argues the State failed to present sufficient evidence on either count.

The State's sole witness at trial was Officer Jason Christophel of the Columbus Police Department, who testified to the following: at around 8:56 p.m. on March 26, 2009, Officer Christophel responded to the Murphy's USA gas station, which is attached to a Wal-Mart, following a report that someone pumped gas into a gold Chevy with license plate number 751LJO and drove away without paying. Officer Christophel observed a car matching the description parked in the parking lot of a nearby Circle K store. Upon approaching and verifying the car's license plate number, Officer Christophel spoke with the driver, who identified himself as Richard Shrum. Then Officer Christophel observed Smith "exiting the Circle K with a bag in her hand." Transcript at 7. Officer Christophel asked Smith if she was with Shrum, Smith replied affirmatively, and Officer Christophel proceeded to question Smith, at some point during the conversation reading her Miranda rights. Smith admitted she pumped gas into the car. After initially claiming she used a gift card to attempt to pay for the gas, Smith admitted she "did not swipe any type of card" and she and Shrum drove away without paying. Id. at 12-13.

Officer Christophel arrested Smith and subsequently performed an inventory search of the car, which uncovered snack foods and other "typical stuff you find at a convenience store." Id. at 9. Officer Christophel testified regarding these items:

> Some of the things belonged to Circle K. Some of the things belonged to Wal-Mart, each of which were identified as their property. I believe the total from Circle K amounted to be eight sixteen and the total from Wal-Mart based off the bar codes, total eight-six, fifty-nine. . . .
> Q. Does Circle K, do you [sic] if [Smith] made any attempt to pay for the items that she left Circle K with?
> A. No she didn't.
> Q. And those were the items you saw her carrying out of there, that correct?
> A. Correct.
> Q. And, did you ask her about the items from Circle K?
> A. No, I did not at that time. She had already been taken to the Bartholomew County Jail.
> Q. Were you ever able to get a copy of the surveillance video?
> A. I did.
> Q. Were you able to watch it?
> A. I did not.

Id. at 9-10.

As to Count I, we conclude the State presented sufficient evidence Smith knowingly or intentionally exerted unauthorized control over the property of Murphy's USA by pumping gas and not paying for it. Officer Christophel's testimony, taken as true, shows Smith admitted to Officer Christophel that she pumped the gas and did not pay or attempt to pay for it. Smith's theory that the State failed to disprove her claim, based on her own testimony, that she paid or attempted to pay with a gift card amounts to a request to reweigh the evidence and judge the credibility of the witnesses, which we will not do. See Drane, 867 N.E.2d at 146. Because the evidence was sufficient to support a conviction, double jeopardy principles do not bar the State from retrying Smith on Count I. See Slayton, 755 N.E.2d at 237.

We reach a different conclusion with respect to the evidence supporting Count II, Smith's alleged conversion of merchandise from Circle K or Wal-Mart. Unlike the

evidence supporting Count I, the State failed to present any evidence that either store reported shoplifting, there was no admission by Smith that she took items without paying, and there was no testimony that anyone observed Smith take items without paying. The fact that items from both stores were found in Smith's car does not prove she failed to pay for them. Likewise, Officer Christophel's observance of Smith carrying items out of Circle K does not prove she failed to pay for those items. The only evidence Smith may have not paid for certain items is Officer Christophel's assertion Smith "didn't" attempt to pay for the items she carried out of Circle K. Tr. at 10. However, Officer Christophel did not testify that he observed Smith fail to pay and was in no position to make such an observation, being outside in the parking lot talking with Shrum whom he was then investigating. Moreover, Officer Christophel's testimony did not refer to any report by Circle K employees or other witnesses which might have supplied a basis for believing Smith failed to pay for the items, and Officer Christophel admitted he never viewed the surveillance video from Circle K. We conclude, based on the evidence the State presented, no reasonable fact-finder could find beyond a reasonable doubt that Smith knowingly or intentionally converted property of Wal-Mart or Circle K. Smith's conviction on Count II is therefore reversed and the trial court instructed to vacate that count.

Conclusion

Smith did not knowingly, voluntarily, and intelligently waive her right to counsel, and although the State presented sufficient evidence to support a conviction on Count I, it failed to present sufficient evidence to support a conviction on Count II. Both

convictions are therefore reversed, and this case is remanded for a new trial on Count I with instructions to vacate Count II.

Reversed in part; reversed and remanded in part.

FRIEDLANDER, J., and KIRSCH, J., concur.