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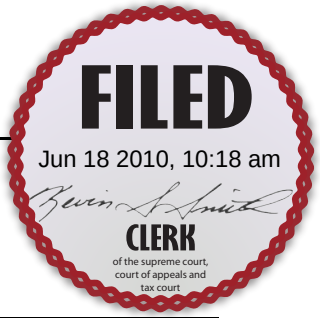

IN THE COURT OF APPEALS OF INDIANA

BRAY A. TIBBS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0911-CR-541
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome J. Frese, Judge
Cause No. 71D03-0810-FB-150

June 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Bray A. Tibbs appeals his conviction and sentence for burglary[1] as a Class B felony, raising the following restated issues:

I. Whether the trial court erred in admitting a witness's juvenile adjudication as impeachment evidence;

II. Whether the trial court erred by failing to protect a witness from harassment and undue embarrassment;

III. Whether Tibbs's sentence was inappropriate in light of the nature of the offense and the character of the offender; and

IV. Whether the trial court abused its discretion by ordering Tibbs to make a $4,376 restitution payment to the victim.

We affirm in part and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On the evening of October 20, 2008, Tibbs and R.G. burglarized the residence of Juan Mangual and his family while they slept and removed several items from the home.

The State charged Tibbs with burglary. Prior to Tibbs's trial, R.G. was adjudicated a delinquent in juvenile court for the burglary of the Mangual residence. During Tibbs's trial, R.G., who was then an adult, testified that Tibbs did not knowingly participate in the burglary. On cross-examination, the State introduced evidence of R.G.'s juvenile adjudication. Tibbs was convicted as charged.

The trial court sentenced Tibbs to a term of ten years with six years executed and four years suspended and ordered him to pay $4,376 in restitution. Tibbs now appeals.

[1] *See* Ind. Code § 35-43-2-1.

DISCUSSION AND DECISION

I. Admission of Impeachment Evidence

Tibbs argues that the trial court abused its discretion when it admitted as impeachment evidence R.G.'s juvenile adjudication for the burglary.

Trial courts have broad discretion in ruling on the admissibility of evidence. *Boney v. State*, 880 N.E.2d 279, 289 (Ind. Ct. App. 2008), *trans. denied*. Abuse of discretion "involves a decision that is clearly against the logic and effect of the facts and circumstances before the court." *Id.* Evidence of a juvenile adjudication is generally not admissible. Ind. Evidence Rule 609(d). However, in a criminal case the trial court may admit evidence of a juvenile adjudication of (1) a witness other than the accused, (2) if conviction of the offense would be admissible to attack the credibility of an adult, and (3) the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. *Id.*

Tibbs argues that evidence of R.G.'s prior juvenile adjudication was not admissible because it was not necessary for a fair determination of the issue of guilt or innocence and that the State had other means to challenge R.G.'s credibility.

Here, Tibbs himself introduced evidence of R.G.'s involvement in the burglary during direct examination. By doing so, he opened the door for the State to explore the subject fully. *Stokes v. State*, 908 N.E.2d 295, 302 (Ind. Ct. App. 2009), *trans. denied*. As the trial court reasoned, because of R.G.'s juvenile adjudication for the burglary, he had effectively been granted immunity because double jeopardy barred further prosecution. The trial court determined that the jury needed to be aware of R.G.'s

"immunity" in order to make a fair determination of Tibbs's guilt or innocence. *Trial Tr.* at 170-73.

Furthermore, "improper admission of evidence is harmless error when the erroneously admitted evidence is merely cumulative of other evidence before the trier of fact." *Purvis v. State*, 829 N.E.2d 572, 585 (Ind. Ct. App. 2005), *trans. denied*, *cert. denied* (2006). Here, R.G. had already confessed to committing the burglary before the State introduced evidence of the juvenile adjudication. *Trial Tr.* at 90. Thus, admitting evidence of the adjudication was cumulative and harmless.

II. Indiana Evidence Rule 611(a)(3)

Tibbs next asserts that the trial court failed to protect R.G. from harassment and undue embarrassment during cross-examination by the State. Specifically, Tibbs argues that the admission of R.G.'s juvenile adjudication for burglary, questions about R.G.'s alleged occupation as a burglar, and the State's description of R.G.'s friendship with Tibbs subjected R.G. to improper harassment and undue embarrassment in violation of Indiana Evidence Rule 611(a)(3). Rule 611(a) states: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (3) protect witnesses from harassment or undue embarrassment." Abuse of discretion is the standard of review for application of this rule. *Riehle v. State*, 823 N.E.2d 287, 294 (Ind. Ct. App. 2005), *trans. denied*.

The scope of cross-examination "includes matters reasonably related to the issues put in dispute by the direct examination, and all inferences and implications arising from the testimony on direct examination." *Stokes*, 908 N.E.2d at 302 (citing *Tawdul v. State*,

720 N.E.2d 1211, 1217 (Ind. Ct. App. 1999)).

Tibbs fails to establish that the trial court allowed the State to ask any questions outside the scope of direct examination. R.G.'s credibility was an issue that the State appropriately addressed by introducing evidence of R.G.'s juvenile adjudication, alleged occupation as a burglar and friendship with Tibbs. We find that there was no abuse of discretion by the trial court regarding the State's cross-examination of R.G.

III. Inappropriate Sentence

Tibbs argues that his sentence was inappropriate given the nature of the offense and the character of the offender. Specifically, Tibbs asserts that the trial court failed to give enough consideration to factors such as Tibbs's relative youth, previously clean record, military service, efforts to obtain education, and efforts to recover stolen property. Also, Tibbs argues that too much consideration was given to the one aggravating factor found by the trial court: the fact that the Mangual family was asleep in their home when the burglary took place.[2] We disagree.

We have authority to revise a sentence authorized by statute if we find it to be inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B). Appellate Rule 7(B) requires that we give "due consideration" to the trial court's decision. The defendant bears the burden of persuading the appellate court that his sentence is inappropriate. *Pitts*, 904 N.E.2d at 322.

[2] Tibbs appears to argue that we should reweigh aggravating and mitigating factors against each other when reviewing his sentence. We decline such a review, because the Indiana Supreme Court has stated that: "The relative weight or value assignable to reasons properly found or those that should have been found is not subject to review for abuse." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007).

Tibbs has not persuaded us that his sentence was inappropriate. Regarding the nature of the offense, Tibbs burglarized the Mangual home while the family was in their home asleep. Regarding Tibbs's character, we note Tibbs's prior clean record, prior military service, ongoing efforts to obtain education, and cooperation with efforts to recover stolen property. The trial court suspended four years of the advisory ten-year sentence. We do not find the sentence to be inappropriate in light of the nature of the offense and the character of the offender.

IV. Restitution

Finally, Tibbs argues that the trial court abused its discretion by ordering him to make a $4,376 restitution payment to the victim. Specifically, Tibbs argues that the amount of restitution required is not supported by sufficient evidence. We agree.

Indiana Code section 35-5-5-3(a) provides, in relevant part:

> [I]n addition to any sentence imposed under this article for a felony or misdemeanor, the court may . . . order the person to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of: (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate) ….

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. *Wittl v. State*, 876 N.E.2d 1136, 1138 (Ind. Ct. App. 2007) (citing *Henderson v. State*, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006)). The amount of restitution ordered must reflect only actual costs incurred by the victim. *Kimbrough v. State*, 911 N.E.2d 621, 639 (Ind. Ct. App. 2009).

The amount of actual costs incurred by the victim is a factual matter that can be determined only upon the presentation of evidence. *Bennett v. State*, 862 N.E.2d 1281, 1286 (Ind. Ct. App. 2007).

The trial court entered a restitution order based on evidence found in the Victim Impact Statement. The Victim Impact Statement only contains the victim's statement of the total value of the stolen property of $9,444.88. It is not itemized, nor is any valuation methodology set out. The statement also shows that the victims' insurance company paid a claim for the stolen property of $5,590 after a deductible of $500. The Investigative Report which was also presented to the trial court itemizes the stolen property and sets forth the value as $6,869. There is no reconciliation of the different amounts, nor explanation for the different totals. There is also no evidence to show that the victims sustained a loss in excess of their insurance recovery. As a result we conclude that the trial court abused its discretion by ordering Tibbs to pay $4,376 in restitution. We remand with instructions to vacate the restitution order.

Affirmed in part and remanded with instructions.

FRIEDLANDER, J., and ROBB, J., concur.