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IN THE COURT OF APPEALS OF INDIANA

MARCEL ROUNDTREE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No.18A04-0910-CR-577
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No. 18C01-0806-FD-96

June 21, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Following a bench trial in Delaware Circuit Court, Marcel Roundtree ("Roundtree") was convicted of Class D felony theft and Class D felony possession of a controlled substance. Roundtree appeals and presents the following restated issues:

I. Whether the trial court erred in admitting Roundtree's statement to the police into evidence;

II. Whether the State presented evidence sufficient to prove that the pills Roundtree possessed contained hydrocodone; and

III. Whether the sentence imposed by the trial court, consisting of concurrent sentences of thirty months on each count with twelve months suspended, was inappropriate.

Facts and Procedural History

At the time relevant to this appeal, Amber Shaw ("Shaw") lived in an apartment in Muncie, Indiana. Roundtree routinely drove Shaw to the pharmacy so that Shaw could pick up her prescription medications, including Lortab.[1] Lortab contains the controlled substance hydrocodone.[2]

On June 7, 2008, Roundtree took Shaw to the pharmacy in a Marsh supermarket. The pharmacist who filled the prescription placed a generic for Lortab pills, which she identified as hydrocodone, in a prescription bottle with Shaw's name on it.

Later that day, Shaw called the police and reported that Roundtree had stolen either her prescription or her medication. Muncie Police Officer Matthew Millsaps ("Millsaps") was dispatched to Shaw's apartment on a report of a theft in progress. As he

[1] Lortab is a brand name for a combination of acetaminophen and hydrocodone. See Wells v. State, 904 N.E.2d 265, 272 n.3 (Ind. Ct. App. 2009), trans. denied; see also http://www.nlm.nih.gov/medlineplus/druginfo/drug_La.html (May 17, 2010).

[2] See Ind. Code § 35-48-2-6(b)(1)(K) (2004) (defining hydrocodone as a schedule II controlled substance).

approached Shaw's apartment, he saw Roundtree, whom he recognized from prior encounters, sitting on the front porch stoop. As Millsaps approached, he notice Roundtree take something out of his pocket, open the storm door, and place what had been in his pocket between the storm door and the main door. Millsaps patted down Roundtree for officer safety purposes and then looked between the storm door and the main door to see what Roundtree had placed there. In that space he found twelve white, oblong pills. In an open trash bin a few feet away from the stoop, Millsaps found Shaw's empty prescription bottle for hydrocodone. After identifying the pills and taking photographs of them and the bottle, Millsaps returned the items to Shaw.

Millsaps then prepared to transport Roundtree to jail. As he did so, Roundtree asked what he was being arrested for. Millsaps told Roundtree that he was being charged with theft and possession of a controlled substance. As Millsaps drove Roundtree to jail, Roundtree stated that he stole the pills because Shaw owed him money.

The State charged Roundtree with Class D felony possession of a controlled substance and Class D felony theft. Roundtree waived his right to a jury trial, and subsequently filed a motion to suppress claiming that his statement to Millsaps was obtained in violation of his Miranda rights. At the suppression hearing, Millsaps testified that, although Roundtree was in custody at the time of his statement, he had not asked Roundtree any questions or made any other statement other than to tell Roundtree what he was being arrested for. The trial court denied the motion to suppress.

At trial, Roundtree objected to the admission of his statement to Millsaps, again claiming that the statement was obtained in violation of his right to remain silent. The

trial court overruled the objection. During his case-in-chief, Roundtree did not deny that Shaw's pills contained hydrocodone. In fact, he claimed that he had taken Shaw's pills to prevent her from overdosing on the medication. He further claimed that Shaw had attempted to take the pills back, knocking them on the floor in the process. Roundtree also testified that Shaw owed him money because he had previously bailed her out of jail. The trial court found Roundtree guilty as charged.

On September 28, 2009, the trial court held a sentencing hearing. The trial court found Roundtree's criminal history to be an aggravating factor in sentencing. Roundtree's criminal history consisted of three felony convictions for possession of marijuana and ten misdemeanor convictions, including five convictions for possession of marijuana. The trial court gave little mitigating weight to Roundtree's remorse and gave little mitigating weight to the proffered mitigators indicating that Roundtree received SSI disability income, that he suffered from medical issues, and that incarceration would be a hardship on him and his dependents. Concluding that the aggravating factors outweighed the mitigating factors, the trial court imposed concurrent sentences of thirty months on each conviction, with twelve months suspended to probation. Roundtree now appeals.[3]

I. Admission of Roundtree's Statement

Roundtree first claims that the trial court erred in denying his motion to suppress his statement to the police. Because Roundtree is appealing following his conviction and is not appealing the trial court's interlocutory order denying his motion to suppress, the

[3] We heard oral argument in this case on May 12, 2010, at the City Hall in Muncie, Indiana. We extend our thanks to our hosts for their hospitality, and we commend counsel for the quality of their oral advocacy.

question is properly framed as whether the trial court erred in admitting his statement into evidence. Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied. But whether the challenge is made by a pre-trial motion to suppress or by trial objection, our standard of review of rulings on the admissibility of evidence is essentially the same. Id. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling, but we also consider the uncontested evidence favorable to the defendant. Id.

Roundtree claims that his statement made to Officer Millsaps was inadmissible because there is no indication that he knowingly or voluntarily waived his Miranda rights. Roundtree notes that although Millsaps gave him a Miranda waiver form, Roundtree never signed the form.

"Rights under Miranda apply only to custodial interrogation." White v. State, 772 N.E.2d 408, 412 (Ind. 2002). Here, there seems to be no question that Roundtree was in custody. Therefore, the issue is whether Roundtree was subject to interrogation. "Under Miranda, 'interrogation' includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect." Id. Volunteered statements do not constitute interrogation. Id.

Roundtree claims that he was subject to custodial interrogation, citing Alford v. State, 699 N.E.2d 247 (Ind. 1998), and Wright v. State, 766 N.E.2d 1223 (Ind. Ct. App. 2002). In Alford, the defendant informed the investigating officer that he wanted to talk to an attorney. After this, the investigating officer continued to tell the defendant about the potentially incriminating evidence that the police had discovered. On appeal, our

supreme court held that the officer's "monologue about the discovery of potentially incriminating evidence had no apparent purpose other than to induce Alford to say something inculpatory." 699 N.E.2d at 250. The court held that confronting the defendant with this incriminating evidence was an interrogation for Miranda purposes. Id.

In Wright, the arresting officer handcuffed the defendant and patted him down, but did advise him of his Miranda rights. As he patted the defendant down, the officer stated, "[T]hat's rock cocaine right there," to which the defendant responded, "Oh, that's my own use, that's my own stash. You know, that's my own personal stash." Id. at 1231. On appeal, we held that the arresting officer's statement regarding the cocaine amounted to an interrogation because it could have led to a response that was reasonably likely to be useful to the prosecution at trial. Id. Because the statement was obtained without advising the defendant of his Miranda rights, we held the statement should not have been admitted at trial. Id.

In contrast, here, Roundtree's statement to Millsaps was not in response to any express questioning or words or actions that were reasonably likely to elicit an incriminating response from Roundtree. Instead, Roundtree simply volunteered his statement after Millsaps answered his question regarding what he was being arrested for. In other words, Roundtree was simply not subject to any interrogation. Because he was not subject to interrogation, Miranda is inapplicable, and the trial court did not err in admitting Roundtree's statement into evidence.

II. Sufficiency of the Evidence

Roundtree next claims that the State presented insufficient evidence to support his convictions. Upon a challenge to the sufficiency of evidence to support a conviction, we neither reweigh the evidence or judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and we will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Roundtree's argument regarding the sufficiency of the evidence is that the State failed to prove that the pills he possessed contained hydrocodone. At first blush, this would seem to attack only the sufficiency of the evidence supporting his conviction for possession of a controlled substance. But Roundtree also claims that, to convict him of theft, the State had to prove that he stole not just Shaw's pills, but Shaw's *hydrocodone* pills, as alleged in the charging information.

We reject Roundtree's argument that, in order to prove theft, the State had to prove that the pills were precisely what was alleged in the charging information. See McCullough v. State, 672 N.E.2d 445, 449 (Ind. Ct. App. 1997) (rejecting defendant's claim of a fatal variance between the charging information and the evidence where the State alleged defendant had stolen "United States currency" but the evidence established that defendant had stolen a check). However, we also find that the State presented sufficient evidence to establish that the pills Roundtree stole were in fact hydrocodone as alleged.

In arguing that the State failed to prove that the pills contained hydrocodone, Roundtree notes that the pills themselves were not introduced into evidence and that no chemical tests were performed on the pills to show that they contained hydrocodone. He also notes that the pharmacist who testified at trial simply stated that she had filled a Lortab prescription for Shaw and did not identify any of the pills that were found at the scene.[4] However, the identity of a drug can be proven by circumstantial evidence. Vasquez v. State, 741 N.E.2d 1214, 1216 (Ind. 2001). "The opinion of someone sufficiently experienced with the drug may establish its identity, as may other circumstantial evidence." Id.

Here, the State presented substantial circumstantial evidence showing that the pills were hydrocodone, including: (1) the pharmacist's testimony that she put hydrocodone pills, which she identified as the generic for Lortab, into Shaw's prescription bottle on the date that Roundtree was arrested; (2) Shaw told the police that Roundtree stole her prescription or pills; (3) Officer Millsaps saw Roundtree take items from his pocket and place the items inside the storm door; (4) Millsaps saw and recovered twelve white, oblong tablets where he had seen Roundtree place the items; (5) Millsaps discovered Shaw's empty hydrocodone prescription bottle in an open trash bin a few feet from the door; (6) the pharmacist testified that the pills she used to fill Shaw's prescription looked like the pills in a drug-identification form shown to her, which depicts a white, oblong

[4] Roundtree cites Jackson v. State, 891 N.E.2d 657 (Ind. Ct. App. 2008), trans. denied, and Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), in support of his claims. Both of these cases, however, deal with the question of whether admission of a lab report prepared for use at trial violates a defendant's right to confrontation under the Sixth Amendment. Because there was no lab report admitted at Roundtree's trial, there is no confrontation issue before us, and these cases are inapposite.

pill similar to those found and photographed by Millsaps; and (7) Millsaps testified that the pills he found were similar to those identified on the drug-identification form as hydrocodone.

In addition to this evidence, we cannot ignore Roundtree's statement to the police and his testimony at trial.[5] In his statement to the police, Roundtree confessed to stealing Shaw's "medication." Tr. p. 27. And at trial, Roundtree testified that Shaw had given him her pills, which he identified as Lortab. See Tr. p. 76 ("she handed them to me and told me to hold on to them because she didn't want to lose them because she'd had nothing else except for her Lortab."). Roundtree also testified that he tried to keep the pills from Shaw because he was concerned that she had already taken too many pills. Roundtree's statement and his own testimony at trial, along with the other circumstantial evidence delineated above, are sufficient to establish that the pills Roundtree took from Shaw did indeed contain hydrocodone. We therefore conclude that the evidence was sufficient to support both of Roundtree's convictions.

[5] Roundtree argues that his statement to the police, by itself, is insufficient to prove that the pills were hydrocodone, citing Warthan v. State, 440 N.E.2d 657 (Ind. 1982). In Warthan, the court held that, under the *corpus delicti* rule, a defendant's confession, standing alone, is insufficient to support a conviction. Id. at 660. To be sure, a crime may not be proved solely on the basis of a confession; instead, the *corpus delicti* of the crime must be established by independent evidence that an individual committed a criminal offense. Williams v. State, 837 N.E.2d 615, 617 (Ind. Ct. App. 2005), trans. denied. The independent evidence, including circumstantial evidence, need only provide an inference that a crime was committed. Id. at 617-18. Here, Roundtree's confession was not the only evidence regarding the identity of the pills. Indeed, the circumstantial evidence listed *supra* is more than sufficient to provide an inference that a crime was committed. Thus, Roundtree's statement was properly considered along with the other circumstantial evidence.

III. Appropriateness of Sentence

Roundtree lastly claims that his sentence is inappropriate under Appellate Rule 7(B), which provides that we may revise a sentence otherwise 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 we have the power to review and revise sentences, "[t]he principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Roundtree's argument regarding the appropriateness of his sentence is rather brief. He simply asserts that: "he received SSI Disability income, which indicated that he was suffering from medical issues, and incarceration could cause undue hardship to him," and that "the trial court erred in giving this factor no weight, and imposing a sentence in excess of the advisory sentence."[6] Appellant's Br. p. 8.

[6] Roundtree also appears to contest the weight given to the mitigating factors. However, as we explained in Wells, under the current advisory sentencing scheme, "[a] trial court no longer has any obligation to 'weigh' aggravating and mitigating factors[.]" 904 N.E.2d at 273 (citing Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007)). Thus, when imposing sentence under our current sentencing scheme, "a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors." Wells, 904 N.E.2d at 273 (quoting Anglemyer, 868 N.E.2d at 491).

With regard to the nature of the offense, we note that Roundtree's theft was more egregious than a "run-of-the-mill" theft because he stole from a friend who, by Roundtree's own admission, was under influence of drugs at the time. There was also evidence that the victim suffered from high levels of pain, yet Roundtree was still willing to steal her pain medication. Also, Roundtree stole the pills because Shaw allegedly owed him money, which suggests that Roundtree intended to sell the pills to offset the amount Shaw owed him.

With regard to the character of the offender, we agree with the State that Roundtree's sentence would be justified in light of his character alone. As noted above, Roundtree has a rather lengthy criminal history, including three felony convictions involving controlled substances, in addition to ten misdemeanor convictions, five of which involve marijuana. Roundtree has also previously been given the grace of probation, yet continues to commit crimes. Indeed, when Roundtree was released on bond in the present case, he was arrested and charged with yet another crime.

Under these facts and circumstances, and giving due consideration, as we must, to the trial court's sentencing discretion, we cannot say that Roundtree's aggregate sentence of thirty months, with twelve months suspended, was inappropriate.

Conclusion

Because Roundtree was not subject to interrogation, his statement to the police was properly admitted into evidence. The evidence presented by the State is sufficient to support Roundtree's convictions, and the sentence imposed is not inappropriate.

Affirmed.

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