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ATTORNEY FOR APPELLANT:

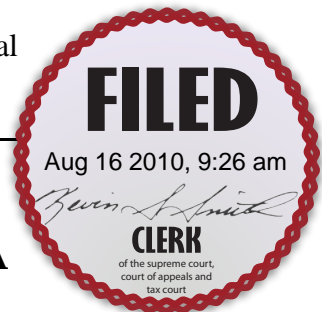
RICHARD L. LANGSTON
Frankfort, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES E. PORTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



MATTHEW DONOHO,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 12A05-0912-CR-717

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-0907-FC-130

August 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Matthew Donoho appeals his convictions, following a jury trial, of burglary, a Class C felony, theft and possession of marijuana, both Class D felonies, and criminal mischief, a Class A misdemeanor. For our review, Donoho raises two issues: whether the trial court erred when it denied Donoho's motion for directed verdict based on sufficiency of the evidence, and whether double jeopardy under the Indiana Constitution bars Donoho's convictions for burglary and theft. Concluding the evidence is sufficient and Donoho's burglary and theft convictions do not violate the state constitutional prohibition against double jeopardy, we affirm.

Facts and Procedural History

On November 19, 2008, Donoho and his stepson, Patrick Janz, were at LA Wingers, a restaurant and bar in Clinton County. While sitting at the bar, Donoho asked "what would be the best way to rob the place," and whether it would be better to go in the front or the back door. Transcript at 146-47. Donoho, Janz, and two others waited for the bartender, Brandon Carter, until Carter was done cleaning the place for closing. Carter gave them a ride home. Later that morning, Carter was called back to the bar by the owner Kenneth Amich, because there had been a break-in. The back door was kicked off the frame; a digital juke box was knocked over; and pool tables and a dart machine were damaged when the robber attempted to pry them open in order to get money out of the dispensers. Two cash registers were found in a dumpster in an alley behind LA Wingers with approximately \$400.00 to \$500.00 removed from them. Two cases of beer were taken from the bar. Also, a cigarette butt containing Donoho's DNA was found on

the floor near the back door. The morning after the break-in, the following occurred: Donoho was seen with a “wad of money” at a time when it was unusual for Donoho to have large amounts of money; Donoho admitted to a friend that he “ripped off LA Wingers”; Donoho sold two cases of beer to an acquaintance, Frank Schocke II; Donoho told his stepdaughter, Jamie Cheek, that “he ain’t got no Christmas, I’ll just go hit another place up and get a thousand dollars.” Id. at 141. Detective Albaugh went to Donoho’s home after learning he was one of the last people at the bar before closing. Upon entering Donoho’s residence, Detective Albaugh observed drug paraphernalia on a coffee table and a cigarette butt matching the one found on the floor of LA Wingers.

On September 9, 2009, a jury found Donoho guilty of Class C felony burglary, theft and possession of marijuana, both Class D felonies, and Class A misdemeanor criminal mischief. Donoho then admitted to being an habitual offender. On November 16, 2009, the trial court sentenced Donoho to five years for burglary, three years for theft, three years for possession of marijuana, and one year for criminal mischief. The sentences on all counts were ordered to be served concurrently. In addition, the trial court enhanced Donoho’s sentence by seven years for the habitual offender finding, for an aggregate sentence of twelve years. Donoho now appeals his convictions.

Discussion and Decision

I. Sufficiency of Evidence

A. Standard of Review

Donoho argues the trial court should have granted his motion for a directed verdict. The standard of review for a denial of a motion for judgment on the evidence is

the same as that for a challenge to sufficiency of the evidence. Hornback v. State, 693 N.E.2d 81, 84 (Ind. Ct. App. 1998). When reviewing the sufficiency of the evidence to support a criminal conviction, we neither reweigh the evidence nor judge witnesses' credibility. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Rather, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Therefore, we will affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

B. Directed Verdict

Donoho claims the only evidence connecting him to the crime scene was the cigarette butt containing his DNA found inside the doorway of LA Wingers; as he was admittedly at the bar the night before the break-in, Donoho contends this is insufficient to connect him to the crimes and therefore, his motion for directed verdict should have been granted. We disagree. The trial court may grant a directed verdict motion "only where there is a total absence of evidence upon some essential issue, or there is no conflict in the evidence and it is susceptible of but one inference, and that inference is in favor of the accused." State v. Boadi, 905 N.E.2d 1069, 1071 (Ind. Ct. App. 2009) (quotations omitted).

Six witnesses' testimony sufficiently links Donoho to the crime scene. Bartender Brandon Carter testified that the cigarette butt was not on the floor when he left the bar before the break-in. Additionally, he stated the cigarette butt would have stuck out to

him while he was cleaning the floor because the carpet was green and the butt was in the middle of the floor. Donoho's stepson, Patrick Janz, stated that while he and Donoho were at the bar, Donoho asked him "what would be the best way to rob" the business, and whether he should go through the front or the back door. Tr. at 146-47. Janz also stated that the day after LA Wingers was robbed, Donoho flashed Janz a wad of money, which was unusual because it was the day before Donoho usually received pay from his job. Donoho's friend, Bart Capps, stated that Donoho admitted he "jacked" LA Wingers and was worried about going to jail. Id. at 129- 31. Moreover, Donoho sold two cases of beer to an acquaintance not long after two cases of beer were stolen from LA Wingers. Further, Donoho told his stepdaughter that "he ain't got no Christmas, I'll just go hit another place up and get a thousand dollars." Id. at 141. Donoho has some form of close relationship with four out of the six witnesses who testified, including his stepson, stepdaughter, friend, and acquaintance. The reasonable inferences drawn from their testimony support Donoho's presence at the crime scene, and reasonably could have led the jury to believe Donoho committed the offenses.

However, Donoho claims the incredible dubiousity rule should apply to Carter's testimony regarding the cigarette butt. The rule is as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Gregory v. State, 885 N.E.2d 697, 705 (Ind. Ct. App. 2008) (quotation omitted), trans. denied. The rule does not apply in this case. First, nothing about Carter’s testimony is so incredibly dubious or inherently improbable that it runs counter to human experience and no reasonable person could believe it. Carter stated he would have seen the cigarette during his routine cleaning of the floors before he leaves at night. However, Donoho points out another cigarette was found in the upper bar area, which Carter claimed he must have missed. Although Carter’s testimony is susceptible to more than one interpretation, we cannot reweigh the evidence in favor of Donoho since the jury found Carter’s explanation reasonable. Second, no evidence showed that Carter’s testimony was coerced. Last, other circumstantial evidence besides Carter’s testimony linked Donoho to the crimes. Five other witnesses provided testimony that correlated with Carter’s. Therefore, the evidence was sufficient to connect Donoho to the crime scene.

Moreover, the evidence sufficiently proved that Donoho committed all elements of the offenses. Donoho broke and entered LA Wingers with the intent to commit theft. He stole five hundred dollars out of the cash register and two cases of beer from the bar. Additionally, he committed criminal mischief¹ by kicking the back door off its hinges, throwing two cash registers into a dumpster, and defacing a juke box, pool tables, and a dart machine. As a result, the evidence is sufficient to sustain Donoho’s convictions of Class C felony burglary, Class D felony theft, and Class A misdemeanor criminal mischief; therefore, the trial court properly denied the motion for directed verdict.

II. Double Jeopardy

¹ A conviction of Class A misdemeanor criminal mischief requires the State to prove that Donoho “recklessly, knowingly, or intentionally damaged or defaced property of another person without the other persons consent. Ind. Code § 35-43-1-2 (a) (1).

Donoho contends double jeopardy prevents sentencing on both burglary and theft. Article 1, Section 14 of the Indiana Constitution provides, “no person shall be put in jeopardy twice for the same offense.” Two or more criminal offenses are the “same offense,” for purposes of the Indiana double jeopardy clause, if, with respect to either the statutory elements of the challenged crimes, or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Under the statutory elements test, once essential elements of each charged offense have been identified, a reviewing court must determine whether the elements of one of the challenged offenses could, hypothetically, be established by evidence that does not also establish the essential elements of the other charged offense. Id. at 50. Under the actual evidence test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. at 53.

Evidence of the elements of burglary do not establish the elements of theft. To convict Donoho of Class C felony burglary, the State had to prove Donoho broke and entered “the building or structure of another person, with intent to commit a felony in it.” Ind. Code § 35-43-2-1. To convict Donoho of Class D felony theft, the State had to prove Donoho “knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use.” Ind. Code § 35-43-4-2 (a). The elements of theft and burglary are clearly distinct. The crime of burglary is completed when the offender breaks and enters a building with the mental state to commit a felony therein. On the other hand, theft is completed when a

person takes the property of another with the intention of depriving the owner of the property's use or value. Although the intent to commit theft while breaking and entering a building may relate that theft to the crime of burglary, the elements of the two crimes remain separate. Furthermore, this court has already held that burglary and theft are not the same offense under the statutory elements test. See Payne v. State, 777 N.E.2d 63, 68 (Ind. Ct. App. 2002).

Moreover, Donoho's convictions are proper under the actual evidence test because the crimes of theft and burglary were established by different facts. Theft was established by the fact that five hundred dollars and two cases of beer were removed from LA Wingers. Witness testimony and the very fact that Donoho forcefully entered LA Wingers with the intention of stealing established the elements of burglary. Therefore, Donoho's convictions do not violate state prohibitions against double jeopardy.

Conclusion

Sufficient evidence supports Donoho's convictions, and therefore the motion for directed verdict was properly denied. Further, double jeopardy does not prohibit Donoho's convictions for theft and burglary.

Affirmed.

MAY, J., and VAIDIK, J., concur.