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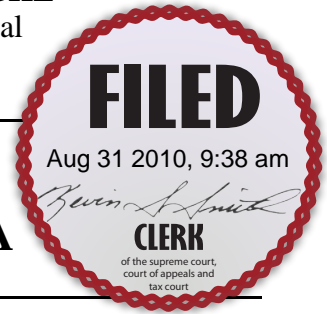
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**IN THE
COURT OF APPEALS OF INDIANA**

OVIDIO ROSARIO,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-1001-CR-17

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard B. Veen, Judge Pro Tempore
Cause No. 49F18-0806-FD-137318

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ovidio Rosario appeals his conviction for theft, a class D felony.¹

We affirm.

ISSUES

1. Whether the evidence was sufficient to support Rosario's conviction for theft.
2. Whether the trial court abused its discretion in admitting evidence.

FACTS

During the afternoon of June 4, 2008, Indianapolis Metropolitan Police Officer Randy Thomas was patrolling the Haughville area of Indianapolis in an unmarked vehicle. When he was within approximately "forty, fifty yards" of a vacant building, he noticed Rosario standing next to the building's electrical panel. (Tr. 60). Rosario was trying to pull a wire out of the panel. Officer Thomas became suspicious as he knew that copper wire is often "stolen and sold for scrap." (Tr. 57).

Officer Thomas radioed for assistance from uniformed officers and then watched as Rosario entered the building through the only open door located on the north side of the building. Uniformed officers arrived soon thereafter and entered the building. Officer Jeffrey Newlin observed Rosario and another man "standing by the control/panel fuse box area." (Tr. 75). Rosario was holding "a blue and yellow handled adjustable wrench." (Tr. 75). The other man was holding a flashlight.

¹ Ind. Code § 35-43-4-2.

Officer Newlin observed a second flashlight “sitting either on top or beside the fuse box,” within Rosario’s reach. (Tr. 82). He also noticed “[s]tripped wire” and copper tubing strewn on the floor and copper wiring hanging from the ceiling. (Tr. 79). Officers found a “ladder leaning up against another fuse box panel[.]” (Tr. 91). Officers also discovered “a long handled pair of bolt cutters” on the north side of the building, next to the air conditioning units. (Tr. 88).

Rosario informed the officers that he ““had permission to be in the building stripping the wire.”” (Tr. 98). The building’s owners, however, had not given anyone permission to be in the building or to salvage its wiring.

On June 9, 2008, the State charged Rosario with theft, a class D felony. The trial court held a jury trial on November 4, 2009. During trial, Officer Thomas identified Rosario as the man he saw pulling wires from the electrical panel. Over Rosario’s objection, the trial court admitted into evidence a mug shot of Rosario, taken after his arrest. The photograph depicted Rosario in street clothes; did not include any criminal information; and was dated June 4, 2008.

Rosario testified that he went into the building to “see what kind of work they were doing and maybe . . . offer [his] help.” (Tr. 170). According to Rosario, he was inside the building “[n]ot even five minutes” before the police arrived. (Tr. 170). He admitted that he did not have permission to be in the building.

The jury found Rosario guilty as charged. Following a sentencing hearing on December 15, 2009, the trial court sentenced Rosario to two years. The trial court held a

restitution hearing on March 16, 2010. Finding that the State failed to establish the amount of loss, the trial court did not order restitution.

Additional facts will be provided as necessary.

DECISION

1. Sufficiency of the Evidence

Rosario asserts that the evidence is insufficient to support his conviction for theft. Specifically, he argues that the “circumstantial evidence proves only that he was present in the building.” Rosario’s Br. at 8. He also argues that the trial court’s statement during the restitution hearing “support[s] a claim of insufficient evidence” *Id.* at 7.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

We will sustain a judgment based on circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt. *Altes v. State*, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), *trans. denied*.

a. *Presence at the scene*

Rosario maintains that the evidence is insufficient to support his conviction as it only shows that he was present at the scene. We disagree.

Mere presence at the crime scene with the opportunity to commit a crime is not a sufficient basis on which to support a conviction. However, presence at the scene in connection with other circumstances tending to show participation, such as companionship with the one engaged in the crime, and the course of conduct of the defendant before, during, and after the offense, may raise a reasonable inference of guilt.

Brink v. State, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied*.

Indiana Code section 35-43-4-2 provides that a “person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft[.]” Thus, the State was required to prove beyond a reasonable doubt that Rosario knowingly or intentionally exerted unauthorized control over the building’s copper wiring and tubing with the intent to deprive the owners of any part of its value or use.

Here, the evidence shows that Officer Thomas witnessed Rosario “trying to pull the wiring out of” the electrical panel located on the building’s exterior. (Tr. 57). Officer Newlin observed Rosario standing near an interior electrical panel with a wrench in his hand. Copper tubing and wires covered the building’s floor and dangled from the ceiling. Officers also found bolt cutters near an air conditioning unit. When the officers confronted Rosario, he admitted that he had been stripping the building’s wiring but claimed that he was doing it with the permission of the owner. The building’s owner,

however, did not give him permission to be in the building or salvage its wiring. Given the evidence in this case, the jury could reasonably infer that Rosario committed theft.

b. *Trial court's statement*

Citing to *Kribs v. State*, 917 N.E.2d 1249 (Ind. Ct. App. 2009), Rosario argues that the trial court's statement during the restitution hearing requires a reversal as the trial court's "finding in that regard supports [his] arguments regarding the weak evidence presented in order to prove the crime of theft." Again, we disagree.

In *Kribs*, the trial court found Kribs guilty of entering a controlled area of an airport with a weapon. During the sentencing hearing, however, the trial court opined that Kribs may have forgotten that he possessed the handgun and therefore did not possess malicious intent. Kribs appealed, arguing that the State failed to prove that he knew he was carrying a handgun.

This court agreed with Kribs that "[m]ere forgetfulness does not satisfy the knowledge or intent requirement set out by the statute" governing Kribs' offense. 917 N.E.2d at 1251 (quoting Krebs' Reply Br. at 3). Given the trial court's conclusion that "Kribs was unaware he had the handgun in his possession when he entered the airport," the *Kribs*-court found "that the State failed to prove beyond a reasonable doubt that Kribs knowingly or intentionally possessed a handgun at the time of the events in question." *Id.* Thus, this court reversed Kribs' conviction.

In this case, Angela Cox testified during trial that she had been taking care of the building on behalf of the owners. She further testified that prior to June 4, 2008, the

“wires were tidy and . . . everything was to code.” (Tr. 139). She, however, did not know the exact condition of the building before Rosario’s arrest on June 4, 2008. According to Cox, she had not been to the building on June 4, 2008; could not remember when she last visited the building prior to June 4, 2008; and did not know how long the building’s wiring had been in disrepair “prior to June 4th[.]” (Tr. 142). The owner of the building testified that she last visited the building in 2006.

During the restitution hearing, the State presented an estimate to repair the building’s wiring. The State, however, admitted that the owners had not undertaken any repairs.

Following the presentation of evidence, the trial court stated as follows:

I think ultimately I have to decide that the State did not carry the burden. As I recall at trial there was nobody from . . . the victim’s family that had been in the business for quite some time before the date of the incident. While there were photographs showing a lot of damage, a great amount of damage, I don’t think it can be shown to the required level that Mr. Rosario was necessarily responsible for that. In addition as the Defense points out the restitution is supposed to be for actual loss and I don’t know what the actual loss is because all I have is an estimate that was prepared a year and a half before trial. . . . Mr. Rosario . . . clearly did a great amount of damage. I don’t know what that amount of damage is because I can’t say what the building looked like before Mr. Rosario went in. . . . So I am going to have to find that the State has not proven enough for me to order restitution.

(Tr. 245-46).

Contrary to Rosario’s assertion, the trial court’s statement does not preclude a guilty verdict. Unlike in *Kribs*, the trial court’s statement does not constitute a factual finding regarding whether the State proved the elements of theft. Rather, it only

addresses whether the State presented sufficient evidence of the actual losses sustained for restitution purposes by the building's owners due to Rosario's offense. Furthermore, the jury in this case found the evidence sufficient to support the guilty verdict. *Kribs* is inapposite to this case, and the evidence is sufficient to support Rosario's conviction for theft.

2. Admission of Evidence

Rosario contends that the trial court abused its discretion in admitting the mug shot taken after his arrest. "We review the admission of photographic evidence for an abuse of discretion." *Wheeler v. State*, 749 N.E.2d 1111, 1114 (Ind. 2001). Indiana Evidence Rule 403 "prohibits the admission of photographic evidence if the probative value of the photograph is substantially outweighed by the danger of unfair prejudice." *Id.*

Prior to Officer Thomas' testimony, Rosario moved to exclude the photograph. The State maintained that it sought to introduce Rosario's photograph to show that his appearance had changed since his arrest; namely, that he had grown a mustache.

Officer Thomas subsequently testified that the photograph depicted the man he saw outside the building, pulling wires from the electrical panel. He further testified that immediately after Rosario's apprehension, he identified Rosario as the man he saw pulling wires and entering the building. Officer Thomas also made an in-court identification of Rosario. Neither the State nor Rosario elicited testimony that Rosario's

appearance had changed since his arrest or that the man witnessed by Officer Thomas did not have a mustache.

While the photograph did substantiate Officer Thomas' identification of Rosario, we cannot say that the photograph had substantial probative value as Rosario's identification was not an issue at trial. *Cf. Bradley v. State*, 770 N.E.2d 382, 386 (Ind. Ct. App. 2002) (stating that the use of mug shots is not improper when relevant and necessary to identify the perpetrator of a crime), *trans. denied*. Nonetheless, we cannot say that the photograph prejudiced Rosario.

The State redacted any information that identified the photograph as a mug shot. "When the State 'has made an effort to disguise the nature of the photograph[] by redacting criminal information and any other information which obviously identifies the photograph as a "mug shot," the photograph is not unduly prejudicial.'" *Farris v. State*, 818 N.E.2d 63, 71 (Ind. Ct. App. 2004) (quoting *Jenkins v. State*, 677 N.E.2d 624, 626 (Ind. Ct. App. 1997)), *trans. denied*. Furthermore, the photograph was dated June 4, 2008, the date of the instant offense. Thus, the jury could not have inferred a criminal history from the photograph where it was obvious that officers arrested him and took him into custody at the scene.

Finally, even if the trial court improperly admitted the photograph, we conclude that any error in the admission of the evidence was harmless.

No error in the admission of evidence is grounds for setting aside a conviction unless such erroneous admission appears inconsistent with substantial justice or affects the substantial rights of the parties. The

improper admission of evidence is harmless error when the conviction is supported by such substantial independent evidence of guilt as to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.

Lafayette v. State, 917 N.E.2d 660, 668 (Ind. 2009) (internal citations omitted).

In this case, the State presented substantial evidence of Rosario's guilt. Officer Thomas identified Rosario as the man he observed pulling wires from the building's electrical panel and entering the building. Officers apprehended Rosario inside the building, standing next to another electrical panel and amid already stripped wires; he was holding a tool, which the jury could have inferred he used to access the panel and strip the wires of copper. In light of this evidence, any error in admitting the photograph of Rosario was harmless.

Affirmed.

BRADFORD, J., and BROWN, J., concur.