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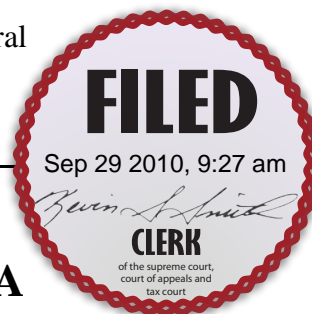
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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL O. BRANCH,)
)
Appellant-Defendant,)
)
) No. 84A05-1004-CR-259
))
))
))
STATE OF INDIANA,)
))
Appellee-Plaintiff.))

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0908-FD-2549

September 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael O. Branch appeals his conviction and sentence for theft, as a Class D felony, following a jury trial. Branch raises five issues for our review:

1. Whether the trial court acted impartially during his trial.
2. Whether the court erred by holding Branch's trial in absentia.
3. Whether Branch received the effective assistance of counsel.
4. Whether the State presented sufficient evidence to support his conviction.
5. Whether his three-year sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 10, 2009, Branch entered a Wal-Mart in Vigo County and placed large quantities of meat in a shopping cart, along with some beer and Indianapolis Colts jerseys. Branch proceeded to an aisle that was not subject to video surveillance, remained in that aisle for about eight minutes, then emerged with the merchandise in Wal-Mart grocery bags. Branch then walked past the cash registers and out of the store, unimpeded, with the bagged but unpurchased merchandise.

On July 14, Clint Gleckler, Wal-Mart's asset protection coordinator, was informed of the large quantities of missing meat. Gleckler "pull[ed] video [to] see if [he and his team] could find out what happened." Transcript at 75. Gleckler viewed the July 10 surveillance recordings and observed Branch engaging in the above-described conduct. Gleckler cross-checked Branch's actions with the store's register transactions during the

time Branch was inside the store. “[T]here w[ere] no large items or large quantities of meat in one or even two transactions” during that timeframe. Id. at 83. Gleckler subsequently turned the surveillance video over to local police.

On August 19, the State charged Branch with theft, as a Class D felony. The court first set Branch’s jury trial for November 9, which was continued to November 12 and then, on Branch’s motion, to November 23. On November 20, Branch filed another motion to continue and failed to appear for the November 23 trial. The court issued a bench warrant for Branch’s arrest and continued the matter until December 7, which, after Branch’s arrest, was reset for December 14. On December 14, Branch “file[d] several pieces of correspondence,” and the court continued his trial to January 19, 2010.

On January 19, Branch again “d[id] not appear inasmuch as he appeared to become ill after arriving in the courthouse.” Appellant’s App. at 7. The court described that occurrence on the record, before it began its voir dire of the jury pool and while the potential jurors were outside the courtroom:

COURT: . . . This is to come on today for trial. The jury was present in the courtroom and we have removed them into the hallway so that they could not hear this record. Shortly after Mr. Branch was brought in, he asked to go to the bathroom where he collapsed and said he was suffering from severe heart pain or chest pain. He seems to be incommunicado. We called the jail nurse, would you raise your right hand and be sworn?

* * *

COURT: Present is Mr. Branch’s attorney, Luther Garcia[,] and also the . . . deputy prosecuting attorney, Rob Schalburg. Mr. Branch is not here. They are waiting maybe to the hospital [sic], however, he has a history of what I believe to be malingering with these chest pains. This is the second time, am I correct that this trial has had to be postponed because of this heart condition, alleged heart condition, I have released him from the jail on at least one occasion and I believe two, to have this heart condition

addressed, he believes he needs a catheterization and . . . neither time did he proceed to have the procedure done. In fact I believe in one of those times he committed or is accused of committing another crime. He has falsified records sent to me, signed by jail doctors, that he needs certain medical treatment which, when being checked up by the sheriff's office they were false, they were forged. There is no doubt in my mind that he is malingering, while he may have a heart condition he never takes advantage of the opportunities we have given him for treatment. The jail doctor can find nothing that would be such that he could not proceed to trial in terms of his medical condition. Today he is in the restroom . . . incommunicado with chest pain. The jail nurse who—would you state your name please?

MS. SLATER: Paula Slater.

* * *

COURT: Okay, and are you an RN, LPN?

MS. SLATER: I'm an LPN.

COURT: LPN. You have examined him just this morning, correct?

MS. SLATER: Yes.

COURT: And would you tell us what your findings are?

MS. SLATER: Mr. Branch was uncooperative with the examination, but he seems to be currently having a problem with anxiety versus actual heart problem at the time. His blood pressure is 128/98 which is very good for him. He does have significant heart disease and high blood pressure problems, but we've had him treated for this on several occasions, he never continues with the treatment once he's out of jail. This morning he received his medication before coming to court. Later an officer called . . . and asked if . . . he could have nitro, or send a nitro, just since giving him nitro since I've been back over here. He doesn't have any significant cardiac signs at the time, there is no diaphoresis, no respiratory issues, his chest is clear, the heart rate is a little elevated at 104, but I believe it is because he is so anxious right now, but it is clear and steady. I can't find that he has anything significantly wrong at this time He's gone to the hospital at least six times that I know of since his incarceration at the Vigo County Jail. . . .

COURT: Would you say that these heart spells so to speak coincide with upcoming legal proceedings and/or his desire to just get out of jail?

MS. SLATER: I do. His girlfriend or wife or significant other has called Doctor Garcia repeatedly trying to get Doctor Garcia to write a recommendation that he be released and Doctor Garcia said he didn't feel that the heart condition was . . . relevant enough to have him released from the responsibility of trial.

COURT: Also I believe that his girlfriend was responsible . . . for forging one of the letters allegedly from Doctor Stevens [which] Doctor Stevens says he did not write. . . . Also during the time that I released him to . . . receive this treatment, we received a call from someone . . . who said he was in Union Hospital and when we checked . . . they had no record of him being there. Is that correct[?]

BAILIFF: Yes.

COURT: It is my opinion [that] these are old cases, he has several cases, he's been offered a plea agreement. I believe that this is a continuous pattern that will continue on any day of trial. . . . [I]t is my experience based on observation of him . . . and my thirtieth year on the bench that he is maligning [sic], so we're going to proceed with the trial without him and I will instruct the jury to disregard the fact that he is not present. . . .

Transcript at 3-8. The court then provided counsel the opportunity to examine the witnesses, and Branch's counsel cross-examined Slater.

The court then called the potential jurors back into the courtroom and instructed them as follows:

Now, Mr. Branch is not present in court. He is and will not be present unless he chooses to come to court. He has a medical condition that we're not sure about, let me put it that way, but we will proceed with . . . this trial without him. The rules will still apply, and you're not to consider in any way the fact that he is here or not here or may come later as anything important to this trial at all. The State will still have the burden of proving that he committed this crime beyond a reasonable doubt Now, before we get started, when I say to you the fact that he is not here and maybe will come later, that [that] should not affect your ability to hear what facts are presented and to follow the law, do any of you as you sit here now can you do that, or do you think that his lack of being here would somehow affect your ability to judge this case according to the rules as I give them to you?

Id. at 14-15. None of the potential jurors disqualified themselves.

During the State's case-in-chief, the State called Gleckler to testify. Gleckler recited Branch's actions on July 10, 2009, based on Gleckler's observation of the surveillance video. The State also called Detective Charles Burrell, who identified Branch in a photograph. The State left for the jury the question of whether the photograph of Branch matched the man in the surveillance video.

At the conclusion of trial, the court instructed the jury, in part, as follows:

In this case the defendant was not present during this trial. The fact that the defendant was not present during this trial raises no presumption of any kind either for or against him. It shall not be commented upon, referred to or in any manner considered by the jury in determining the guilt or innocence of the defendant.

Id. at 149. The jury found Branch guilty. After a sentencing hearing, the trial court ordered him to serve the maximum sentence of three years executed in light of Branch's twenty-year-long criminal history. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Judicial Impartiality

Branch first argues that the trial court committed fundamental error¹ when it described him, outside the presence of the potential jurors, as a "malingerer." See id. at 3-8.

Fundamental error is error that, if not rectified, would deny a defendant fundamental due process. It is not enough, in order to invoke this doctrine, to urge that a constitutional right is implicated. Only when the record reveals clearly blatant violations of basic and elementary principles, and the

¹ Branch concedes that his trial counsel did not preserve this alleged error with a proper objection to the trial court.

harm or potential for harm could not be denied, will this Court review an issue not properly raised and preserved.

Ware v. State, 560 N.E.2d 536, 539 (Ind. Ct. App. 1990), trans. denied. A fair trial by an impartial judge is an essential element in due process. Id. However, “[f]or the fundamental error doctrine to apply, . . . we must find the alleged error so prejudiced the defendant’s rights as to make a fair trial impossible.” Wentz v. State, 766 N.E.2d 351, 357 (Ind. 2002).

Here, Branch’s only citation to the record reveals that, outside the presence of the potential jurors, the trial court explained to counsel that it was going to try Branch in absentia because Branch repeatedly and continuously, and without a genuine medical reason, failed to appear in court. The court described Branch’s behavior as “malingering.” See Transcript at 3-8. That choice of words does not demonstrate fundamental error. The court did not speak in front of the potential jurors, and the only decision even potentially adverse to Branch rendered by the trial court when it made those comments was the decision to try him in absentia (which, for the reasons described below, also was not in error). Nothing in the court’s statements demonstrates that the trial court crossed the bounds of impartiality or actually prejudiced Branch’s case. See, e.g., Washington v. State, 758 N.E.2d 1014, 1018 (Ind. Ct. App. 2001). To the contrary, the court’s comments were merely to explain its rationale for trying Branch in absentia. Accordingly, Branch’s arguments to the contrary must fail.²

² In this section of his brief, Branch also argues that the trial court “considered information that was not admitted into evidence and as a result Branch was denied an opportunity to refute its accuracy.” Appellant’s Br. at 13. The witnesses before the court were properly sworn, their testimonies were not objected to, and the court provided Branch’s trial counsel with the opportunity for cross-examination,

Issue Two: Trial in absentia

Branch next contends that the trial court erroneously tried him in absentia. Both the federal and Indiana constitutions afford defendants in a criminal proceeding the right to be present at all stages of their trial. U.S. Const. amend. VI; Ind. Const. art. I, § 13. However, a defendant may be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right. Jackson v. State, 868 N.E.2d 494, 498 (Ind. 2007). As our Supreme Court has explained:

When a defendant fails to appear for trial and fails to notify the trial court or provide it with an explanation of his absence, the trial court may conclude the defendant's absence is knowing and voluntary and proceed with trial when there is evidence that the defendant knew of his scheduled trial date.

Id. (quotation and citations omitted). The best evidence that a defendant knowingly and voluntarily waived his right to be present at trial is the defendant's presence in court on the date the matter is set for trial. Id. (quotation omitted).

However, a defendant who has been tried in absentia must be afforded an opportunity to explain his absence and thereby rebut the initial presumption of waiver. Diaz v. State, 775 N.E.2d 1212, 1216-17 (Ind. Ct. App. 2002). This does not require a sua sponte inquiry; rather the defendant cannot be prevented from explaining. Id. at 1217. As a reviewing court, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived his right to be present at trial. Id. A defendant's explanation of his absence is a part of the evidence available to a reviewing court in determining whether it was error to try him in absentia. Id.

which he exercised against Slater. As such, Branch's argument is not supported by cogent reasoning or citation to the record, and it is waived. See Ind. Appellate Rule 46(A)(8)(a).

There is no dispute that Branch knew of his trial date but did not appear for his trial. It is therefore presumed that he waived his right to be tried in person. See Jackson, 868 N.E.2d at 498. In rebuttal of that presumption, Branch contends that his “incarceration in Vigo County, combined with the circumstance[s] related to his physical health, constitutes sufficient evidence to rebut any presumption.”³ Appellant’s Br. at 16. On these facts, we cannot agree.

In Adams v. State, 509 N.E.2d 812, 815 (Ind. 1987), our Supreme Court held that a defendant did not rebut the presumption that he waived his right to be present for his trial when he

refused to leave his jail cell to attend his trial. [The defendant] complained of physical ailments. He was examined by a nurse, who found nothing that would prevent him from attending his trial. Our review of the record leads us to conclude that the trial court was justified in finding that [the defendant] voluntarily chose not to attend his trial.

Here, the morning of his trial Branch left the courtroom complaining of chest pains and refused to return. He was examined by a nurse, who testified that Branch did not have “anything significantly wrong at this time.” Transcript at 5-6. And, based on Branch’s similar behavior in the past, the trial court concluded that “this is a continuous pattern that will continue on any day of trial.” Id. at 7. As in Adams, our review of the record leads us to conclude that the trial court was justified in finding that Branch voluntarily, knowingly, and intelligently waived his right to be present at trial. 509 N.E.2d at 815.

³ In passing, Branch suggests that the trial court committed reversible error by not affording him an opportunity to explain his absence. Although that suggestion is devoid of cogent reasoning and therefore waived, see App. R. 46(A)(8)(a), it is also moot because we will consider Branch’s proffered reasons for missing his trial in our appellate review, Diaz, 775 N.E.2d at 1217.

Branch's explanation of his absence does not demonstrate that the trial court erred in trying him in absentia.

Issue Three: Effective Counsel

Branch next asserts that he did not receive the effective assistance of his trial counsel. A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

In particular, Branch objects to his trial counsel's alleged failure to call certain witnesses.⁴ The entirety of Branch's argument on this issue is as follows:

The failure of Branch's counsel to call and/or subpoena witnesses that were known to counsel at the time of trial constitutes ineffective assistance of counsel justifying the vacation of the conviction in this case. Branch filed with the court and served on his counsel and the Prosecutor's office a list of witnesses that he wished to be subpoenaed for his trial.

Appellant's Br. at 17 (citations omitted). Those mere statements do not meet our requirement that the "argument must contain the contentions of the appellant . . . supported by cogent reasoning." Ind. Appellate Rule 46(A)(8)(a). Branch does not discuss who was and was not called as a witness, what difference it might have made if

⁴ Branch also avers that his trial counsel was ineffective for not objecting to the trial in absentia. As discussed above, however, the court did not err in holding Branch's trial without him. As such, his trial counsel did not render ineffective assistance for failing to object on that issue.

an uncalled witness had been called, or what strategy his counsel may have employed in deciding who to call as a witness. As such, we will not consider this issue. Branch has waived our review of whether his trial counsel performed ineffectively.

Issue Four: Sufficiency of the Evidence

Branch also argues that the State did not present sufficient evidence to support his conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

In order to prove that Branch committed theft, as a Class D felony, the State was required to show that Branch “knowingly or intentionally exert[ed] unauthorized control over property of another . . . with intent to deprive the other person of any part of its value or use.” Ind. Code § 35-43-4-2(a). Further, for there to be theft there must be an asportation of the property. See, e.g., Stroud v. State, 272 Ind. 12, 14, 395 N.E.2d 770, 771 (1979).

In other words, it must appear that the property was taken from the possession of the victim into that of the [thief]. But the crime is consummated if the [thief] acquires possession of the property for even a short time, and his subsequent disposition of the property taken is immaterial.

Nelson v. State, 528 N.E.2d 453, 455 (Ind. 1988) (quotation omitted).

Here, Branch first contends that the State failed to present any evidence that the items he removed from the Wal-Mart store originally belonged to Wal-Mart. That is not so. Gleckler, Wal-Mart's asset protection coordinator, testified that he observed surveillance video that showed Branch removing items from a Wal-Mart shelf and, without paying for those items, exiting the store with the items inside Wal-Mart grocery bags. Gleckler also testified that it was brought to his attention to investigate the matter after the meat department's manager informed him of the missing products. The reasonable inference from Gleckler's testimony is that Wal-Mart was the rightful owner of the stolen items. Thus, the State presented sufficient evidence that Branch wrongfully deprived Wal-Mart of its property.⁵

Branch also argues that the State failed to prove his identity as the thief. The State had the July 10 surveillance video admitted into the record for the jury's review. The State also provided the jury with a photograph of Branch, which was supported by Detective Burrell's testimony. The jury compared that evidence and concluded that Branch was the thief. Branch's arguments on appeal that the jury's assessment was "unreasonable," "incredibly dubious," and "inherently improbable,"⁶ Appellant's Br. at

⁵ On this issue, Branch also states that

Gleckler never claimed to be an officer of the corporation or that he was even appearing in a representative capacity for the corporation. . . . Gleckler was not the owner and therefore had no knowledge of ownership or lawful possession. All Gleckler could testify to at the time of trial was that Wal-Mart owned the property inside the store.

Appellant's Br. at 20. Insofar as those statements are intended to be an argument for reversal of Branch's conviction, they lack cogent reasoning and are waived. App. R. 46(A)(8)(a).

⁶ We agree with the State that Branch's additional statement that the evidence was "unduly suggestive and highly prejudicial" is not an argument supported by cogent reasoning. See id.; Appellant's Br. at 22.

22, are really requests for this court to reweigh the competent evidence before the jury, which we will not do, see Jones, 783 N.E.2d at 1139. The State presented sufficient evidence to support Branch's conviction for theft.

Issue Five: Sentencing

Finally, Branch argues that his three-year sentence is inappropriate in light of the nature of his offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See App. R. 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration original).

As the State notes, the nature of the offense here is not "particularly egregious." Appellee's Br. at 21. Nonetheless, "revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his offense[] and his character." Williams v. State, 891 N.E.2d 621,

633 (Ind. Ct. App. 2008) (emphasis original). For the reasons stated by the trial court, Branch cannot demonstrate that his three-year sentence is inappropriate in light of his character.

The trial court enhanced Branch's sentence to the three-year maximum due to Branch's extensive criminal history. Branch was forty-four years old at the time of his sentencing, and he has a criminal history that extends back to 1988. Branch has at least thirteen prior felony convictions, several felony charges pending, and more than several misdemeanor convictions and probation violations. That background reveals Branch's poor character. His three-year sentence on this conviction is not inappropriate.⁷

Conclusion

In sum, none of the issues raised on appeal by Branch demonstrates reversible error. As such, we affirm his conviction for theft, as a Class D felony. We also affirm his three-year sentence for that conviction.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.

⁷ Branch also states that "the overlooked mitigating factors . . . along with the serious due process violations balance out the weight of the Court's appropriate aggravators and make the sentence imposed manifestly unreasonable." Appellant's Br. at 28. Insofar as those statements may have been intended as an argument distinct from the Rule 7(B) argument addressed above, Branch's statements are not supported by appropriate citations or cogent reasoning and, therefore, are not considered. See App. R. 46(A)(8)(a).