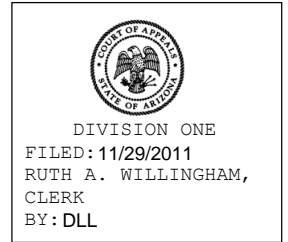


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 10-0985
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DARNELL CAIN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-138023-003 SE

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And W. Scott Simon, Assistant Attorney General
Attorneys for Appellee

Kenneth S. Countryman, P.C. Phoenix
By Kenneth S. Countryman
Attorney for Appellant

B R O W N, Judge

¶1 Darnell Cain appeals from his convictions and sentences for two counts of theft and two counts of burglary. For the following reasons, we affirm.

BACKGROUND¹

¶2 On June 4, 2009, Cain and two accomplices entered a convenience store in Gilbert, filled three large plastic bags with cigarettes, liquor, and other merchandise, and left without paying. The clerk who witnessed the incident called the police and the store manager. The store manager arrived, closed the store, and performed a "scan audit" on merchandise that was thought to be missing. Based on the audit, the manager estimated the total loss at \$10,940–\$10,200 for cigarettes, \$700 for other tobacco products, and \$40 for liquor.

¶3 Four days later, on June 8th, Cain and the same two accomplices returned to the same convenience store. The three individuals again filled three large plastic bags with cigarettes, liquor, and other merchandise and left without paying. The same clerk was working and again called police and his store manager. The manager arrived soon thereafter, closed the store, and performed the same type of audit. The manager estimated the total loss from this theft at \$11,500–\$10,000 for

¹ We view the evidence in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against Cain. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

cigarettes, \$900 for other tobacco products, \$300 for liquor, and \$300 for general merchandise. Both thefts were videotaped by surveillance cameras.

¶4 Shortly after the June 8th incident, a Gilbert police officer saw a vehicle matching the description of the one seen fleeing the store and initiated a traffic stop. Officers arrested Cain and his accomplices, obtained a search warrant, and seized three large plastic bags filled with merchandise.

¶5 At trial, the store manager testified to the inventory procedures in place at the convenience store. Inventory audits on certain products such as cigarettes are done weekly, and a complete audit is performed every ninety days by an outside auditing team. The store manager could not testify to the exact amount stolen during the June 4th incident but maintained that the estimated total figure was not off by more than \$200, which is the average ninety-day shortage for the entire store.

¶6 For the first incident, Cain was indicted on one count of third degree burglary (count 1), a class four felony, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-1506 (2009), and one count of theft of property of \$4000 to \$25,000 (count 2), a class three felony, under A.R.S. § 13-1802 (2009). For the second incident, Cain was indicted under the same statutory provisions (count 3-burglary; count 4-theft). Following a three-day trial, a jury found Cain guilty on all

counts. The trial court found that Cain was a category three repetitive offender pursuant to A.R.S. § 13-703(C) (Supp. 2011)² and sentenced him to the presumptive terms of 10 years on counts 1 and 3, and 11.25 years on counts 2 and 4. The court ordered that counts 1 and 2 would be served concurrently and counts 3 and 4 would be served concurrently, but counts 3 and 4 would be served consecutively to counts 1 and 2. This appeal followed.

DISCUSSION

¶17 Cain argues that the State presented insufficient evidence to prove that the market value of the items he took during each of the thefts was between \$4000 and \$25,000, as required by A.R.S. § 13-1802(G). "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411-12, ¶ 6, 103 P.3d 912, 913-14 (2005). Substantial evidence is that which "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *Id.* (internal quotations and citation omitted).

¶18 To prove the value of the items taken on both June 4th and June 8th, the State offered the testimony of the store manager. She testified that she used a scan auditing system

² Absent material revision after the date of the alleged offense, we cite the statute's current version.

shortly after each of the thefts occurred to calculate an estimate of the value of the items missing. She had knowledge of the value of the merchandise in the store based on her experience conducting these inventory audits, qualifying her to testify to the value of the items in her store. See *Acheson v. Shafter*, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971) ("It is well-established that an owner may generally estimate the value of his real or personal property and this is true whether he qualifies as an expert or not."); see also *State v. Banks*, 924 So.2d 1059, 1062-63 (La. Ct. App. 2006) (accepting testimony of store manager to establish value of items stolen where manager had knowledge of retail value based on use of scanning system); *Griffin v. State*, 530 P.2d 1366, 1368-69 (Okla. Crim. App. 1975) ("[I]n prosecutions for larceny of merchandise from a retailer, a store manager's testimony as to value is sufficient to establish . . . the value of the merchandise.").

¶19 Based on the scan inventory audit, the manager estimated the total loss on June 4th at \$10,940-\$10,200 for cigarettes, \$700 for other tobacco products, and \$40 for liquor. Considering the average ninety-day shortage is \$200, the total estimated loss related to the theft was \$10,740, still more than twice the required minimum amount under the statute. This testimony alone provides substantial evidence from which a

reasonable juror could determine that the value of the items taken on June 4th was between \$4000 and \$25,000.

¶10 The manager further testified that she conducted a scan audit shortly after the second theft on June 8th. Based on those audit figures, she estimated the loss on that day to be \$11,500–\$10,000 for cigarettes, \$900 for other tobacco products, \$300 for liquor, and \$300 for general merchandise. A reasonable juror could easily determine from this testimony that the value of the theft on June 8th was between \$4000 and \$25,000.

¶11 Cain also asserts that the trial judge erred by imposing consecutive sentences because “she believed she had no choice.” We disagree. The trial court has broad discretion in deciding whether to impose consecutive or concurrent sentences. *State v. Ward*, 200 Ariz. 387, 388–89, ¶¶ 4–5, 26 P.3d 1158, 1159–60 (App. 2001). Furthermore, “[j]udges are presumed to know and follow the law and to consider all relevant sentencing information before them.” *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). Contrary to Cain’s assertion, we find no indication in the record that the trial judge “believed she had no choice” in sentencing Cain to consecutive terms. The judge explained that the reason she chose to impose consecutive sentences was because “the offenses in counts 3 and 4 were not committed on the same day as the offenses committed in counts 1

and 2," pursuant to Arizona Rule of Criminal Procedure 26.13.³ Therefore, we find the trial court did not err in deciding that the sentences for counts 3 and 4 should run consecutive to the sentences for counts 1 and 2.

CONCLUSION

¶12 For the foregoing reasons, we affirm Cain's convictions and sentences.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Judge

/s/

PHILIP HALL, Judge

³ "Separate sentences of imprisonment imposed on a defendant for 2 or more offenses . . . shall run consecutively unless the judge expressly directs otherwise." Ariz. R. Crim. P. 26.13.