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IN THE COURT OF APPEALS OF INDIANA

STEVEN E. BRISCOE and ROGER F. BRISCOE,	)	
Appellants-Defendants,	)	
vs.	)	No. 43A03-0705-CR-244
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0512-FD-297

January 28, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Steven Briscoe ("Steven") and Roger Briscoe ("Roger") (collectively "Briscoes") were each convicted in Kosciusko Circuit Court of one count of Class D felony theft and sentenced to eighteen months executed. Steven and Roger appeal and argue that the trial court abused its discretion when it:

I. Admitted inadmissible evidence;

II. When it refused their tendered jury instruction;

III. That the evidence is insufficient to support the jury verdict; and

IV. That their sentence is inappropriate.

We affirm.

Facts and Procedural History

In October of 2005, Glen Ransbottom ("Ransbottom") noticed that a tree stand he had placed on his property was missing. After developing the film in a trail camera placed near the stand, he discovered that on October 1, 2005, two men had removed the tree stand. Subsequently, the two men in the photo were identified as Steven and Roger Briscoe.

On December 20, 2005, the State charged Roger with one count of Class D felony theft. The following day, the State charged Steven with one count of Class D felony theft. On October 10, 2006, the two cases were consolidated. The Briscoes filed a motion in limine regarding identification at trial on February 28, 2007. After a jury trial that began on March 5, 2007, the Briscoes were convicted as charged. The Briscoes were each sentenced to the advisory sentence of eighteen (18) months executed and ordered to pay restitution in the amount of $152.74. The Briscoes now appeal.

I. Inadmissible Evidence

The admission or exclusion of evidence is within the sound discretion of the trial court. Ackerman v. State, 774 N.E.2d 970, 974 (Ind. Ct. App. 2002), trans. denied. We will only reverse the trial court if it has abused its discretion. Id.

Evidence Rule 404(b) provides in part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

The Briscoes argue that their identification by four law enforcement officers at trial allowed the jury to infer that the Briscoes had criminal records and that information would be prejudicial to the their defense. The day of trial, the Briscoes filed a motion in limine seeking, in part, to prevent the State from presenting evidence regarding uncharged allegations of misconduct. The trial court denied this portion of the motion in limine and the Briscoes objected. Also, prior to trial, the Briscoes offered to stipulate to the identity of the two individuals in the photograph. The State refused to stipulate to identity. At trial, three law enforcement officers identified the two men in the photograph as the Briscoes and stated that they knew them through prior experience. Tr. pp. 54, 55, 57, 60.

While the officers' testimony may have been error as the Briscoes offered to stipulate to identity and that testimony would have been cumulative, that error was harmless. "Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. An error will be found

harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Gall v. State, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004) trans. denied.

At trial, Steven testified that he and Roger, were the individuals in the photograph carrying the deer stand. With this testimony, the probable impact of the law enforcement officers' testimony on the jury recedes. While the jury could infer that the Briscoes had committed prior bad acts, the actual testimony was so brief that any impact on the jury would be sufficiently minor. Additionally, the testimony as to identification was merely cumulative with Steven's admission regarding the persons in the photo. While the trial court should not have allowed the officers' testimony since it was cumulative after the Briscoes offered to stipulate to the identity of the men in the photograph, the testimony was harmless error as its impact on the jury was minor and did not affect the substantial rights of the Briscoes.

II. Insufficient Evidence

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of 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 therein 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.

The State charged the Briscoes under Indiana Code section 35-43-4-2 (a) that provides, in pertinent part:

> 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, a Class D felony.

Steven testified that he and Roger were the men in the photograph and the photograph showed them with the tree stand. Ransbottom testified that he did not know the Briscoes or give them permission to take the tree stand. Tr. pp. 31, 33, 37. Ransbottom also testified that the Briscoes were carrying his tree stand, that it is no longer attached to a tree on his property, and that he had purchased the tree stand a number of years before. Tr. pp. 24, 27, 31. Finally, Ransbottom has never recovered the tree stand and therefore has been deprived of its value or use. Tr. p. 47. This evidence is sufficient to support the Briscoes' Class D felony theft convictions. Also, the Briscoes' argument is simply a request for this court to reweigh the evidence, which we will not do.

III. Jury Instruction

The trial court has within its sound discretion the manner of instructing a jury, and we review its decision thereon only for an abuse of that discretion. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006).

A. *Conversion as Lesser-Included Offense*

The Briscoes argue that the trial court should have instructed the jury regarding conversion as a lesser-included offense to theft. When an instruction on a lesser-included offense is offered, the trial court must use a three-part test to determine whether that instruction should be given.

> First, the trial court must compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine if the alleged lesser-included offense is inherently included in the crime charged.

> Second, if a trial court determines that an alleged lesser-included offense is not inherently included in the crime charged under step one, then it must determine if the alleged lesser-included offense is factually included in the crime charged. If the alleged lesser-included offense is neither inherently nor factually included in the crime charged, the trial court should not give an instruction on the alleged lesser-included offense.
>
> Third, if a trial court has determined that an alleged lesser-included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties to determine if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater. '[I]t is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense' if there is such an evidentiary dispute.

Spann v. State, 850 N.E.2d 411, 414-15 (Ind. Ct. App. 2006) (citing Wright v. State, 658 N.E.2d 563, 567 (Ind. 1995)).

Neither party denies that conversion is a lesser-included offense of theft. However, the State argues that there is no serious evidentiary dispute regarding the "intent to deprive" element. We agree. Steven testified that he believed that the deer stand was his property and that he had moved it to another site and used it there until it was stolen from him. He did not testify that he mistakenly took the deer stand which would have allowed the jury to find that the Briscoes had not intended to deprive Ransbottom of the use and value of his property. We conclude that based on the facts and circumstances of this case, the trial court did not abuse its discretion when it refused to give Briscoes requested instruction on criminal conversion as a lesser-included offense of theft.

B. *Mistake of Fact Defense*

The Briscoes argue that the trial court should have given an instruction on the defense of mistake of fact. The tendered instruction stated: The defense of mistake of fact is defined by law as follows:

> It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.
>
> The reasonable mistake about a fact must have prevented the defendant from acting intentionally, knowingly or recklessly as those terms are defined by law.
>
> The State has the burden of disproving this defense beyond a reasonable doubt.

Br. of Appellant p. 175.

When the trial court refuses a tendered instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether evidence in the record supports the giving of the instruction; and (3) whether the other instructions given have covered the substance of the tendered instruction. Stringer, 853 N.E.2d at 548. "Jury instructions are to be considered as a whole and in reference to each other." Id. Unless the entire jury charge misleads the jury as to the law in the case, error in a particular instruction will not result in reversal. Id. To be entitled to a reversal, the defendant must affirmatively show the instructional error prejudiced his substantial rights. Id.

The Briscoes' tendered instruction is a correct statement of the law as it is set out in Indiana Code section 35-41-3-7 (2004). Also, the evidence and testimony presented at trial could have led the jury to the conclusion that the Briscoes were mistaken as to the ownership of the deer stand. Steven testified that the deer stand which he is seen carrying with his brother is his property.

However, we need not actually determine whether the trial court erred in failing to give the tendered instruction. Even if we assume that the trial court erred in rejecting the instruction, any error would be harmless. The court instructed the jury regarding the elements of the crime of theft, defined "unauthorized," defined the elements of culpability, and explained that the State bore the burden of proving guilt beyond a reasonable doubt. Appellant's App. pp.158-164. The final jury instructions required the jury to determine if the Briscoes had the intent to commit the crime of theft. If the jury believed that the deer stand did indeed belong to Steven, then the Briscoes could not have possessed the requisite intent, and they would have been found not guilty. Unfortunately for the Briscoes, the jury apparently chose not to believe Steven's testimony regarding his ownership of the deer stand and determined that the Briscoes indeed had the requisite intent to commit theft. In other words, the jury rejected Steven's testimony, which would necessarily reject any claim of mistake of fact.

IV. Inappropriate Sentence

The Briscoes finally argue that their sentences are inappropriate. First, the Briscoes assert that the trial court abused its discretion when it failed to provide a sentencing statement. Under Anglemyer and Indiana Code section 35-38-1-1.3 (2007), the Briscoes would be correct in their assertion, however when the Briscoes were sentenced on April 5, 2007, Anglemyer had not been decided nor had the statutory requirement of a sentencing statement gone into effect.

In Windhorst v. State, 868 N.E.2d 504, 506 (Ind. 2007), the trial court did not enter a sentencing statement but adhered to long standing precedent which did not require

a statement when imposing the presumptive sentence. In the present case, the trial court did not abuse its discretion by failing to enter a sentencing statement because it was not required to do so at the time of the sentencing hearing. Id. at 506-507.

Additionally, we have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied. "[A] defendant must persuade the appellate court that his or her sentence has met the inappropriateness standard of review." Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007). Additionally, "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Id. at 490.

Concerning the nature of the offense, the Briscoes entered private property and removed Ransbottom's deer stand that has not been recovered to this date. The trial court imposed the advisory sentence on both of the Briscoes because of the circumstances of the theft.

Steven's character also supports the imposition of the advisory sentence. Steven has been convicted of four misdemeanors including a conviction for Class C misdemeanor hunting, fishing, or trapping without consent in 2006. Additionally, he has failed to show any remorse and admitted use of marijuana one week before the pre-sentence report. Based on his prior criminal history, lack of remorse and illegal drug use, we conclude that the advisory sentence is not inappropriate in light of the nature of the offense and the character of Steven.

Roger's character also supports the imposition of the advisory sentence. Roger has been convicted of three misdemeanors and a Class C felony conspiracy to commit robbery in 1996. Additionally, Roger has violated probation and been discharged unsatisfactorily. Based on Roger's prior criminal history, specifically his felony conviction, we conclude that the advisory sentence is not inappropriate in light of the nature of the offense and the character of Roger.

Conclusion

The Briscoes' Class D felony theft convictions are supported by sufficient evidence and their advisory sentences of eighteen months are not inappropriate in light of the nature of the offense and the character of the offender. The trial court did not abuse its discretion when it refused the Briscoes' tendered jury instruction on conversion as a lesser-included offense. The trial court erred in refusing the Briscoes' tendered jury instruction on the defense of mistake of fact but that error is harmless. Finally, the trial court's admission of testimony related to identity was harmless error.

Affirmed

NAJAM, J., and BRADFORD, J., concur.