

**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



ATTORNEY FOR APPELLANT:

**DAVID ROSSELOT**  
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

**STEPHEN R. CARTER**  
Attorney General of Indiana  
Indianapolis, Indiana

**MICHAEL GENE WORDEN**  
Deputy Attorney General  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

JOSE TINDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A05-0711-CR-643
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT  
The Honorable George Hopkins, Judge  
Cause No. 34D04-0702-FC-00019

**APRIL 11, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant Jose Tinder appeals his conviction of burglary, a Class C felony. We affirm.

## ISSUES

Tinder raises three issues for our review, which we restate as:

- I. Whether the State presented sufficient evidence to support Tinder's conviction.
- II. Whether the trial court erred in denying Tinder's motion for directed verdict.
- III. Whether the imposition of an eight-year executed sentence is appropriate.

## FACTS AND PROCEDURAL HISTORY

On the evening of December 16, 2006, a person threw a cinder block through the front window of Fast Lane Foods, a Howard County convenience store. The store's surveillance cameras taped the incident and showed a black male wearing a light blue, hooded sweatshirt (1) throwing the block through the window, (2) entering the store through the broken window, (3) advancing upon a "Pot-o-Silver" quarter machine, (4) shaking the machine, (5) breaking the front glass out of the machine; and (6) reaching into the machine for items contained therein.

The next morning, Kokomo Police Officer Brian Sheetz and store manager Paige Gain viewed the surveillance tapes. Although Gain did not know the name of the person shown on the tape, she did recognize him as one of the store's customers.

Sometime later that day, Police Investigator Shane Melton lifted fingerprints from the front of the machine and sent the samples to the State Police Lab for verification. None of the fingerprints matched Tinder's prints. However, Melton later procured a search warrant for the residence Tinder shared with Regina Hester. There, he found piles of cinder blocks and the light blue, hooded sweatshirt. At trial, Gain identified Tinder as the man whose image was captured by the surveillance cameras.

## DISCUSSION AND DECISION

### I. SUFFICIENCY OF THE EVIDENCE

Tinder contends that the State failed to present sufficient evidence to show that he was the person who committed the burglary. He further contends that the State failed to present sufficient evidence to show that he intended to commit a felony inside the store.

When reviewing the sufficiency of evidence to support a conviction, an appellate court considers only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Courts of review must be careful not to impinge on the fact-finder's authority to assess witness credibility and to weigh the evidence. *Id.* We will affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)).

With reference to identity, Tinder's argument is a request that this court reweigh the evidence. The jury was free to believe Gain's testimony that she recognized Tinder from the surveillance tape as a customer who had been “in and out” of the store. Tr. at 44. The jury could certainly compare Tinder's appearance at trial with the surveillance

photos and with Tinder's arrest photo to determine that he was the person who committed the offense. Furthermore, the jury was free to determine that Tinder's possession of a light blue, hooded sweatshirt and of a pile of cinder blocks was probative evidence. Because the jury had ample probative evidence upon which to conclude that Tinder was the burglar, we must view his contention as an invitation to reweigh the evidence. We decline that invitation. *See Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005).

Ind. Code § 35-43-2-1 provides that a person commits the Class C felony of burglary when he "breaks and enters the building or structure of another person, with the intent to commit a felony in it. . . ." Tinder maintains that the State failed to show that he entered the store with the intent to commit a felony therein. In support of his argument, he claims that because Gains was unable to say how much money was missing from the machine, there is no proof that anything was taken, and thus, that a felony occurred inside the store.

The intent to commit a felony element of a burglary charge may be inferred from the circumstantial evidence of the nature of the evidence. *Webster v. State*, 708 N.E.2d 610, 615 (Ind. Ct. App. 1999), *trans. denied*. In the present case, the specific felony alleged was theft, a felony which occurs when a person knowingly or intentionally exerts unauthorized control over property of another person with the intent to deprive the other person of any part of its value or use. *See* Ind. Code § 35-43-4-2(a). The evidence shows that Tinder broke into the store and went directly to the machine containing a large number of coins. He then broke the machine open and removed items from the machine. There was a trail of coins leading from the machine to the broken window and beyond.

This evidence was sufficient to demonstrate that Tinder intended to commit theft when he broke the window and entered the store through the broken window.

## II. DIRECTED VERDICT

Tinder contends that the trial court erred in denying his motion for directed verdict following the conclusion of the State's case-in-chief. However, because Tinder presented evidence following denial of his motion and did not renew his motion at the close of all evidence, he has waived this issue on appeal. *See DeWhitt v. State*, 829 N.E.2d 1055, 1063 (Ind. Ct. App. 2005); *Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). Furthermore, where the evidence is sufficient to sustain a conviction on appeal, the denial of a motion for directed verdict cannot constitute error. *Huber*, 805 N.E.2d at 890.

## III. SENTENCING

Tinder contends that imposition of an eight-year sentence is inappropriate. He notes that Ind. Code § 35-50-2-6 provides for a sentencing range of two to eight years, with an advisory sentence of four years. He argues that the maximum possible sentence should be reserved for the "worst possible defendants." Appellant's Brief at 11.<sup>1</sup>

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans.*

---

<sup>1</sup> Tinder also argues the imposition of the eight-year sentence is inappropriate because the State presented questionable identification evidence at trial. As we discussed above, there was sufficient identification evidence to support Tinder's conviction. Therefore, Tinder's "questionable identification" argument fails.

*denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The “nature of the offense” portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court’s sentence review. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007). The “character of the offender” portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

The record shows with regard to the nature of the offense that Tinder threw a cinder block through a store window, entered the store, threw another block through a machine containing money, and removed coins and other items from the machine. Although nothing about the nature of the offense, standing alone, warrants an enhanced sentence, the nature of the offense requires nothing less than the advisory sentence and permits a greater sentence. *See Felder v. State*, 870 N.E.2d 554, 559 (Ind. Ct. App. 2007) (although nothing about the nature of the offense warrants an enhanced sentence, the sentence was appropriate based on defendant’s character).

It is Tinder’s character, however, that shows that imposition of the maximum sentence is appropriate. Tinder has five felony convictions and three probation violations. He was on probation at the time he committed the present offense. Tinder also committed another offense near in time to the present offense. The Pre-Sentence Investigation Report shows that Tinder has had almost constant contact with the criminal

justice system for nearly twenty years. Tinder has exhibited a criminal propensity that prior probation attempts and incarceration have not modified. There is nothing in Tinder's character that indicates that it will change absent serious punishment.

In light of the nature of the offense and (particularly) Tinder's character, we cannot say that the sentence imposed was inappropriate.

#### CONCLUSION

The State presented sufficient evidence to support Tinder's burglary conviction. Furthermore, Tinder's second issue is waived. In addition, he failed to establish that his sentence is inappropriate under App.R. 7(B).

Affirmed.

BAKER, C.J., and ROBB, J., concur.