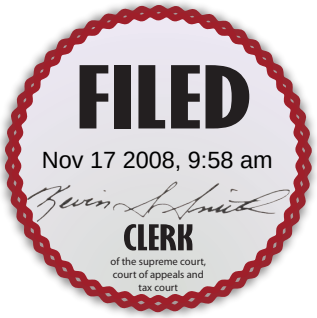

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IN THE
COURT OF APPEALS OF INDIANA

RONALD WATSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A03-0805-CR-217
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITLEY SUPERIOR COURT
The Honorable Michael D. Rush, Judge
Cause No. 92D01-0604-FD-255

November 17, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Ronald Watson (Watson), appeals his conviction for theft, as a Class D felony, Ind. Code § 35-43-4-2(a).

We affirm.

ISSUES

Watson presents two issues for our review, which we restate as:

(1) Whether the trial court abused its discretion when it admitted evidence of Watson's conduct on an occasion other than the time for which he was charged with theft; and

(2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Watson committed theft.

FACTS AND PROCEDURAL HISTORY

Prosystems, LLC (Prosystems), located in Churubusco, Indiana, installed a video surveillance camera to monitor scrap metal bins located behind its building. On April 1, 2006, the camera recorded an unauthorized taking of scrap metal. The recorded images were of a Ford two-color extended-cab pickup truck with four rear wheels, also known as a "dually." (Transcript p. 93). The truck had chrome "dual smoke stacks" sticking up right behind the cab. (Tr. pp. 79, 92).[1] The video showed that the driver of the truck was a white male and wore his hair in a ponytail.

[1] Watson did not file with our court the exhibits entered as evidence during the jury trial, including the DVD recording of the theft, which was played for the jury.

On April 10, 2006, Sergeant Michael Engle of the Whitley County Sheriff's Department (Sgt. Engle), reviewed the video record, produced a photograph of the truck, and posted the photograph and description of the event as a flyer in the squad room at the Whitley County Jail. Indiana State Police Trooper Leslie Bills (Trooper Bills) saw the posted flyer. On April 17, 2006, Trooper Bills stopped a pickup truck for speeding, and discerned that the truck matched the truck in the flyer. Watson was driving the pickup truck and had his hair in a ponytail. Trooper Bills called Sgt. Engle, who then came to the scene where Watson had been pulled over for speeding. Sgt. Engle observed that the truck pulled over matched the truck from the video. He asked Watson and an occupant in the passenger seat, Randy Michael (Michael), Watson's brother-in-law, to follow him to the jail for questioning.

At the jail, Sgt. Engle read an advice of rights form to Watson and Michael and had them sign a statement of acknowledgement. Watson eventually told Sgt. Engle that he was at Prosystems on April 1, 2006, and took scrap metal, but stated that he paid an employee "under the table" to get it. (Tr. p. 82). However, Watson refused to write out a statement to that effect.

On April 28, 2006, the State filed an Information charging Watson with theft, as a Class D felony. On July 20, 2006, Watson filed a notice of alibi. On October 3, 2007, a jury trial was held. That same day, the State informed Watson's trial counsel that it intended to elicit testimony from Michael about an event where Watson and Michael were arrested for theft of metal scrap in Elkhart County on June 19, 2006. A hearing was held outside the presence of the jury, and Watson's counsel objected. The State assured the trial court that it

would only elicit testimony regarding what had happened on June 19, 2006, but would not "discuss any proceedings beyond . . . June 19th, 2006." (Tr. p. 105). The trial court ruled the evidence admissible to address identity and lack of mistake, but agreed to give the jury a limiting instruction.

During the trial, the State entered the surveillance recording and testimony from Sgt. Engle and Trooper Bills, among other things. The State also called Michael, who testified that he picked up scrap metal in Elkhart with Watson on June 19, 2006, "with permission." (Tr. p. 112). The State pressed Michael further about his habit of collecting scrap with Watson:

State: How many times do you do it? How many, I'm asking you how many times?

Michael: None, no more.

State: No more. Okay. When did you stop?

Michael: Your date right there.

State: June 19th?

Michael: Right.

State: Okay. Because the police came in Elkhart?

Michael: Because somebody was having a heart attack. It wasn't because of scrap.

* * * *

State: Mr. Michael you've taken an oath to tell the truth here today. This, this, do you remember that. The judge gave it to you sir?

Michael: Yes.

State: Okay. And so your statements here today, would you agree with me that they need to be truthful?

Michael: They are.

(Tr. pp. 114-15). As Michael was dismissed from the witness stand, the trial court gave a limiting instruction to the jury, by stating in part:

> I don't want you to assume that if something happened in Elkhart County in June of 2006, that, that is any evidence whatsoever that [Watson] committed the crime he is charged with on April the 1st, 2006. The limited purpose of hearing something about an event that had perhaps had some similarities to it in June of 2006, was for the purpose of the State showing some intent, knowledge, and identity.

(Tr. p. 122).

The State rested after Michael's testimony, and Watson presented Maxine L. Copeland (Copeland) as his sole defense witness. Copeland testified that Watson drove her to Chicago on the weekend of April 1, 2006.

At the close of evidence, the jury deliberated and returned a verdict of guilty as charged. The trial court entered a judgment of conviction on the verdict. On February 4, 2008, the trial court held a sentencing hearing, and on March 31, 2008, the trial court sentenced Watson to the Department of Correction for three years, but Watson was to be released to the custody of Whitley County to serve the three years in a work release program.

Watson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Before we address the merits of the appeal, we note that Watson's attorney included a copy of the presentence investigation report on white paper in the Appellant's Appendix. In *Hamed v. State*, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006), we explained:

> Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:
>
> > Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
> >
> > (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
> >
> > (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

We ask that counsel follow this procedure in the future.

I. *Evidence of Other Conduct*

Watson argues that the trial court abused its discretion when it permitted the State to present evidence of Watson's conduct on a date different than April 1, 2006. Specifically, he

contends that the testimony from Michael violated the prohibition of Indiana Evidence Rule 404(b). We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

Indiana Evidence Rule 404(b) prohibits evidence of other crimes, wrongs, or acts by stating as follows:

> 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(Emphasis added). From our review of the record, it is apparent that the State, did not present any evidence "to prove the character of [Watson] in order to show action in conformity therewith." Reviewing the proceedings outside of the presence of the jury regarding Michael's potential testimony, it is clear that the State intended to have Michael testify that he and Watson were arrested for taking scrap metal in Elkhart County. The State intended to introduce this evidence to rebut Watson's contention that he was not the person in the surveillance recording. However, the testimony that was actually presented to the jury was that Watson and Michael took scrap metal in Elkhart County with permission, and the police were summoned to the scene because someone had a medical emergency. As such,

Michael's testimony would not demonstrate any character of Watson that would lead the jury to conclude that he stole scrap metal from Prosystems. *See Johnson v. State*, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005), *trans. denied* (holding that statement of denial of misconduct did not "portray [defendant's] character in order to show action in conformity therewith.") Therefore, we conclude that the trial court did not abuse its discretion when it admitted the evidence of Watson's other act of taking scrap metal with permission.

II. *Sufficiency of the Evidence*

Watson also argues that the evidence submitted by the State was not sufficient to prove beyond a reasonable doubt that he committed theft. However, it is apparent from reviewing the Transcript, and the arguments of the parties on appeal, that the surveillance video was the lynchpin of the State's evidence. But Watson's counsel did not ensure that this crucial piece of evidence was transmitted with the record to our court on appeal, and thus we do not have it to review. Despite this crucial omission on the part of Watson's counsel, we will nevertheless proceed to review his contention of insufficient evidence.

Our standard of review with regard to sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. Reversal is appropriate

only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

In order to convict Watson of theft, as a Class D felony, the State was required to prove that Watson knowingly or intentionally exerted unauthorized control over the scrap metal with the intent to deprive Prosystems of any part of its value. *See* I.C. § 35-43-4-2. Sgt. Engle testified that the truck in the surveillance video was "unique" and he had not come across another like it in the twenty years that he had worked as a police officer. (Tr. pp. 79-80). Trooper Bills also testified that the truck he saw in the flyer was "unique," especially "the chrome stacks sticking out right behind the cab." (Tr. p. 92). Both Sgt. Engle and Trooper Bills testified that they recognized the truck that Watson was driving when stopped by Trooper Bills as matching the unique truck used to take the scrap metal. Moreover, Sgt. Engle testified that when he confronted Watson with the video, Watson eventually said, "I was there. I took metal, but I paid a guy under the table who is an employee to get it." (Tr. p. 82). We conclude that this is sufficient evidence to prove beyond a reasonable doubt that Watson committed theft, as a Class D felony.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it admitted evidence of another act of taking scrap metal by Watson and that the State

presented sufficient evidence to prove beyond a reasonable doubt that Watson committed theft, as a Class D felony.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.