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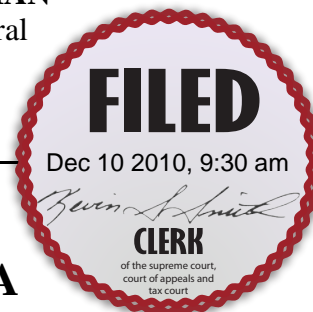
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**IN THE
COURT OF APPEALS OF INDIANA**

JONATHON DILLARD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-1008-CR-427

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D01-0904-FD-355

December 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jonathon Dillard appeals his conviction for Class D felony attempted theft. He contends that the State failed to present sufficient evidence to disprove his defense of abandonment. Concluding that the State presented sufficient evidence, we affirm.

Facts and Procedural History

The facts most favorable to the judgment reveal that Timmy Stephens, a loss prevention officer at Meijer in Mishawaka, Indiana, was in the monitor room watching live surveillance video when he observed Dillard in the electronics department with a shopping cart. When Dillard began “selecting multiple items in doubles and putting them in the cart,” Tr. p. 9, this caught Stephens’ attention. For example, Dillard selected HD converter boxes, DVD players, cell phones, and DVDs totaling over \$1700. After putting these items in his shopping cart, Dillard headed toward the garden center. Although the garden center was closed at the time, it was open so that employees could move stock around. There were no cash registers in the garden center.

When Dillard entered the garden center, he pushed the shopping cart behind the greenhouse, which was an area that the surveillance cameras could not monitor. Stephens notified the Mishawaka Police Department and proceeded to the garden center, where he hid behind some skids of mulch and observed Dillard. Stephens watched as Dillard pushed some DVDs through the garden center fence (because they were the only items that could fit) and then reached into his jacket and pulled out a set of bolt cutters. Dillard then cut the lock off the fence and loosened the chain. Dillard put the bolt cutters back in his jacket and exited the garden center, leaving the shopping cart containing the

remaining merchandise near the fence. Dillard reentered the store, exited the store's south doors into the parking lot, and got into a red Camry. Stephens observed Dillard "drive towards the front of the store," "towards Bremen Highway facing away from the store, he was going to turn left, then Mishawaka Officers apprehended him." *Id.* at 13; *see also id.* at 41 ("He went to the south, then turned to the northwest. . . . He was first actually turning the car towards the south, that would be towards the garden center."). Specifically, Officer Eric Laudeman arrived on the scene. Dillard immediately drove by Officer Laudeman. Officer Laudeman stopped Dillard as Dillard was driving north through the parking lot. Bolt cutters were found inside the trunk of Dillard's car.

Dillard was taken inside Meijer's loss prevention office and given *Miranda* warnings. Dillard asked the officers why he was being arrested and whether he was going to be charged with criminal conversion. He "repeatedly" asked what was considered part of the store. *Id.* at 65. When Officer Laudeman asked Dillard where he worked, Dillard responded, "I work on the streets, man." *Id.* at 52. When another officer asked Dillard how he intended to pay for the merchandise, Dillard responded, "I'm going to jail, man." *Id.*

The State charged Dillard with Class D felony attempted theft and Class B misdemeanor criminal mischief. The State also alleged that Dillard was a habitual offender. At the bench trial, Dillard testified in his own defense. He specifically denied cutting the lock. Instead, Dillard explained that he filled up the cart with merchandise to purchase and went to the garden center to get a flower for his pregnant girlfriend. He left the cart, however, in the garden center when he received a cell phone call from his

girlfriend that she was cramping. The trial court found Dillard guilty of attempted theft.

The court reasoned:

1. On April 6, 2009, the defendant went to a Meijer Store, located at 3610 Bremen Highway, in Mishawaka, St. Joseph County, Indiana.
2. At that store, the defendant loaded numerous items, from the electronic department, into a shopping cart.
3. The defendant then pushed the shopping cart into an outside “garden center” area of the store which was enclosed by a fence.
4. There were no cashiers working nor were there active cash registers in the garden center area and the gate to the fence was secured by a padlock.
5. The defendant used bolt cutters to cut the lock which was securing a gate to the outside garden area, and, then left the merchandise unattended at that location.
6. The defendant left the store but was apprehended by Mishawaka police officers before he could remove the items from the shopping cart which would have been left in the garden area.

Accordingly, the Court finds that the State has proven beyond a reasonable doubt that on April 6, 2009, that the defendant, while acting with the intent to commit the crime of theft, which is defined as knowingly or intentionally exerting unauthorized control over the property of another person with the intent to deprive that person of any part of the use or value thereof, engaged in conduct which constituted a substantial step toward committing that crime, as is named above. The court further finds that given the conduct undertaken by the defendant and the defendant’s testimony, that the court cannot find that the defense of abandonment applies.

Appellant’s App. p. 8-9 (Judgment of Conviction). The trial court did not enter judgment of conviction for criminal mischief because of double jeopardy concerns. *Id.* at 9. The court also found Dillard to be a habitual offender. The court sentenced Dillard to eighteen months for attempted theft, enhanced by three years for being a habitual offender. Dillard now appeals.

Discussion and Decision

Dillard contends that the State failed to present sufficient evidence to disprove his defense of abandonment. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge witness credibility. *Munford v. State*, 923 N.E.2d 11, 17 (Ind. Ct. App. 2010). We instead consider only the evidence which supports the conviction, along with any reasonable inferences to be drawn therefrom. *Id.* at 17-18.

Indiana Code section 35-41-3-10 provides:

With respect to a charge under IC 35-41-2-4 [aiding, inducing, or causing an offense], IC 35-41-5-1 [attempt], or IC 35-41-5-2 [conspiracy], it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.

(Emphasis added). The State has the burden of disproving the defense of abandonment beyond a reasonable doubt if there is evidence supporting the defense. *Munford*, 923 N.E.2d at 15 (citing *Smith v. State*, 636 N.E.2d 124, 127 (Ind. 1994)).

Where attempt is at issue, an accused will be relieved of criminal responsibility if, after taking a substantial step toward committing a crime but before its consummation, he voluntarily abandoned his efforts. *Id.* at 18. “To be considered voluntary, the decision to abandon must originate with the accused and not be the product of extrinsic factors that increase the probability of detection or make more difficult the accomplishment of the criminal purpose.” *Id.* (quoting *Smith*, 636 N.E.2d at 127).

On appeal, Dillard argues that he voluntarily abandoned his efforts to steal the store’s property because when he left Meijer,

[h]e drove to the north in the Meijer parking lot. His direction of travel was heading away from the shopping cart containing the electronics items in the

Garden Center located on the south side of the Meijer store. . . . Dillard was unaware of the loss prevention officer surreptitiously watching him nor was he aware that the police were responding to the loss prevention officer's call for assistance. . . . The [subsequent] search revealed that Dillard had no Meijer merchandise in his car just as he had no store items on his person.

Appellant's Br. p. 6.

It is apparent that Dillard relies only on the fact that he was driving in the opposite direction of the garden center when Officer Laudeman stopped him in order to prove that he voluntarily abandoned his efforts to steal Meijer's property. Because Dillard was driving in the opposite direction of the garden center in the Meijer parking lot at the precise moment the officer stopped him does not mean that Dillard was not going to head back to retrieve the merchandise. Dillard could have been circling the parking lot and waiting for the opportune time to head back to the garden center in order to collect the items that were waiting for him in the shopping cart on the other side of the fence to which he had just cut the lock. In short, Dillard's direction of travel at the moment he was stopped by Officer Laudeman does not support the defense of abandonment. Moreover, despite the evidence that Dillard cut the lock to the garden center fence with bolt cutters and bolt cutters were found in Dillard's trunk, Dillard denied any attempt to steal the items at trial. Instead, he claimed that he was intending to purchase the items but abruptly left the store when he received a call from his pregnant girlfriend that she was cramping. The trial court, however, did not believe Dillard's testimony and found that based on his actions and testimony, the defense of abandonment did not apply. Even if we were to find evidence in the record supporting the defense, we conclude that the

evidence is sufficient to overcome Dillard's abandonment defense. We therefore affirm his conviction for Class D felony attempted theft.

Affirmed.

BAKER, C.J., and BARNES, J., concur.