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IN THE COURT OF APPEALS OF INDIANA

JASON HOUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 38A04-1102-CR-110
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchison, Judge
Cause No. 38C01-1007-FC-6

October 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jason Hough appeals his convictions for Class C felony burglary and Class D felony theft. Specifically, he contends that the trial court erred in admitting into evidence the items seized from his garage, arguing that the initial traffic stop and subsequent search of his garage were illegal. Second, he contends that the evidence is insufficient to support his two convictions. Finally, Hough contends that his convictions violate Indiana's Double Jeopardy Clause because there is a reasonable possibility that the fact-finder used the same evidence to convict him of both counts. We conclude that there was both an objectively justifiable reason to stop Hough's vehicle and valid consent to search his garage, so the evidence was properly admitted. We also conclude that the evidence is sufficient to support both the burglary and theft convictions. Finally, finding independent evidence in the record to support each of Hough's convictions, we conclude that his convictions do not violate Indiana's Double Jeopardy Clause. We therefore affirm the trial court.

Facts and Procedural History

On the evening of July 11, 2011, Hough, his wife, and Dewey Beckelheimer drove a vehicle with a trailer that contained scrap metal to Small Engine Warehouse, Inc. in Portland, Indiana. Hough told Beckelheimer that the owner was a man by the name of "Charlie" and that he had given Hough permission to take items from the warehouse. Hough said that Charlie worked the late shift and that he would leave the door to the warehouse ajar. He also told Beckelheimer that Charlie had thirty days to vacate the warehouse, which is why the items inside appeared new. Beckelheimer asked Hough if

he had written permission from Charlie to take the items from the warehouse, and Hough replied that he could get that permission in a day or two.

When they arrived at the warehouse, Hough backed the trailer into the warehouse garage and shut the door behind him. Either Hough or Beckelheimer entered the warehouse and pushed a button to open the door so that the others could enter as well. Hough, his wife, and Beckelheimer then loaded several items from the warehouse into the trailer. On their way back to Hough's house, Hough pulled the vehicle over on the side of the road in order to secure the items in the trailer with some straps. Jay County Sheriff's Deputy Tony Lennartz saw the vehicle pulled over and stopped to see if Hough needed any assistance. When Deputy Lennartz observed the contents of the trailer, Hough told him that his father had given him the items to sell for scrap metal. Hough then called his mother and told her "if they ask where this stuff come [sic] from tell them it come [sic] from your house." Tr. p. 44. Deputy Lennartz did not issue any citation, despite the fact that one of the vehicle's brake lights was out and there was no license plate on the trailer.

On the morning of July 12, 2011, Hough took the items from the warehouse to Hartford Iron & Metal. He received $504 for the items.

On July 19, 2011, Jay County Sheriff's Department Investigator Todd Penrod returned from vacation and reviewed Deputy Lennartz's report of the stop of Hough's vehicle. Investigator Penrod spoke to many individuals, including Timothy Padgett, the owner of Small Engine Warehouse, to see if there had been any reports of stolen items that were similar to those in Hough's trailer. Padgett had not been to his warehouse since

the beginning of June, but he said that no one had permission to be in the building without either his consent or the key, which he kept with him.

Investigator Penrod and Padgett went to the warehouse and saw that the door had been forced open and that it looked like it had been ransacked. Investigator Penrod contacted Hartford Iron & Metal and searched the scrap yard for items similar to those he had seen in the warehouse. Investigator Penrod then went to Hough's house and searched the garage after Hough's wife consented to the search. Inside the garage were parts that Padgett identified as ones he had purchased for his business.

The State charged Hough with Class C felony burglary and Class D felony theft. Hough filed a motion to suppress the evidence found in his garage. The trial court held a suppression hearing, following which it denied the motion. After a jury trial, the trial court sentenced Hough to concurrent sentences of seven years for Class C felony burglary and two years for Class D felony theft.

Hough now appeals.

Discussion and Decision

Hough raises three issues, which we restate as: (I) whether the trial court erred in admitting into evidence the items seized from his garage, (II) whether there is sufficient evidence to support his burglary and theft convictions, and (III) whether the theft and burglary charging informations were so vague that they did not guard against the possibility of double jeopardy.

I. Admission of Evidence

Hough argues that the initial traffic stop was illegal, without which there would have been no reason to later search his garage. He also argues that the search of his garage was illegal because the police did not have a warrant. Hough therefore contends that the trial court abused its discretion in denying his motion to suppress the items taken from the warehouse that were seen in his trailer and later found in his garage. We disagree.

Although Hough argues that the trial court erred in denying his motion to suppress, "the issue is . . . appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial." *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied*. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*. However, we must also consider the uncontested evidence favorable to the defendant. *Id.* In this sense, the standard of review differs from the typical sufficiency of the evidence case where only evidence favorable to the verdict is considered. *Fair v. State*, 627 N.E.2d 427, 434 (Ind. 1993).

Hough first argues that the initial stop conducted by Deputy Lennartz was illegal since no citation was issued and the vehicle was already stopped instead of being pulled over for suspicious activity. A police officer may stop a vehicle when he observes a minor traffic violation. *State v. Quirk*, 842 N.E.2d 334, 340 (Ind. 2006). "A traffic

violation, however minor, creates probable cause to stop the driver of the vehicle." *Id.* A stop is therefore lawful if there is an objectively justifiable reason for it. *State v. Rager*, 883 N.E.2d 136, 139 (Ind. Ct. App. 2008).

In this case, Deputy Lennartz noticed that one of the vehicle's brake lights was out and that there was no license plate on the trailer that the vehicle was pulling. Supp. Hrg. Tr. p. 18, 21. These possible infractions were objectively justifiable reasons for Deputy Lennartz to conduct a traffic stop to investigate the vehicle stopped on the side of the road, regardless of whether a citation was actually issued. Therefore, the initial traffic stop of Hough's vehicle was lawful.

Hough then argues that the subsequent search of his garage for the stolen items was illegal because there was no warrant. Hough fails to acknowledge, however, that his wife consented to the search of the garage. Warrantless searches based on lawful consent are not unreasonable. *Lee v. State*, 849 N.E.2d 602, 605 (Ind. 2006), *reh'g denied*. It is uncontested that Hough's wife consented to the search of the garage. Tr. p. 82. Hough's wife had actual authority to give consent, as "[t]he consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person who shares the authority." *Godby v. State*, 949 N.E.2d 416, 420 (Ind. Ct. App. 2011), *trans. denied*. Therefore, the items seized from Hough's garage were not illegally obtained.

Since the initial traffic stop and later search of the garage were both lawful, the trial court did not abuse its discretion in admitting the evidence at trial. We therefore affirm the trial court on this issue.

II. Sufficiency of the Evidence

Hough also argues that the evidence is insufficient to support his convictions for both burglary and theft because the State failed to show that he broke into the warehouse and that he had the intent to steal the items inside.

Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 923 N.E.2d 773, 781 (Ind. Ct. App. 2010), *reh'g denied, trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences draw therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

A. Burglary

Class C felony burglary occurs when a person "breaks and enters the building or structure of another person, with intent to commit a felony in it." Ind. Code § 35-43-2-1. Hough argues that his conviction is improper because there was no evidence at trial that any breaking took place, and that there was no evidence that he himself opened any door on the night of July 11. We disagree.

In order to establish the "breaking" element of burglary, all that is necessary is evidence that the defendant "[u]s[ed] even the slightest force." *Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002), *reh'g denied*. Additionally, the evidence need not show that the defendant personally participated in the commission of each element of a crime

to be convicted of that crime under a theory of accomplice liability. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002), *reh'g denied*; *Fox v. State*, 497 N.E.2d 221, 227 (Ind. 1986). A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if not charged as an accomplice. Ind. Code § 35-41-2-4; *Taylor v. State*, 840 N.E.2d 324, 328 (Ind. 2006). But, in order to sustain a conviction as an accomplice, there must be evidence of the defendant's affirmative conduct, either in the form of acts or words, from which an inference of common design or purpose to effect the commission of a crime may reasonably be drawn. *Vandivier v. State*, 822 N.E.2d 1047, 1054 (Ind. Ct. App. 2005), *trans. denied*.

At trial, Beckelheimer's testimony indicates that a "breaking" did take place. When asked about the events that took place on the night of July 11, Beckelheimer said "[o]ne of us went down the, just straight down the corridor and pushed a button, an electric button, up comes the door." Tr. p. 40. This opening of a door after a button was pressed is sufficient evidence to demonstrate that force was used in gaining access to the warehouse.

There was also substantial evidence that Hough acted affirmatively along with Beckelheimer to steal the items from the warehouse. Beckelheimer testified that either he or Hough entered the warehouse and that Hough pulled the vehicle into the garage and shut the door. Tr. p. 39, 41. This evidence shows more than Hough's mere presence during the commission of the crime; rather, a reasonable inference may be drawn from his conduct that he was actively involved in the commission of the crime.

This evidence is sufficient to support Hough's conviction for Class C felony burglary.

B. Theft

Class D felony theft occurs when a person "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." Ind. Code § 35-43-4-2(a). Hough argues that the evidence at trial was insufficient to show the requisite intent because he thought "the property had been abandoned" and therefore there could be "no crime of theft." Appellant's Br. p. 16. We disagree.

The evidence adduced at trial shows that Hough was not under the impression that the property was abandoned. That night, Hough said that he was going to call Charlie to let him know that he and Beckelheimer were on their way to the warehouse and that he could have written permission from Charlie to take items from the warehouse in a day or two. Tr. p. 36-37, 55. Hough also told Beckelheimer that Charlie had thirty days to vacate the warehouse. *Id.* at 55. All of these statements indicate that Hough believed that there was an active owner of the warehouse.

Additionally, when Deputy Lennartz conducted his traffic stop, Hough said that his father had given him the items to sell for scrap metal. He also called his mother and said "mom if they ask where this stuff come [sic] from tell them it come [sic] from your house." *Id.* at 44. This again indicates Hough's belief that the warehouse was not abandoned. If he thought the property was freely available to take, he would not have

lied about its origin during his interaction with the police or asked his mother to do the same.

In addition to the evidence presented at trial, a reasonable person would not assume that items stored inside a locked warehouse were abandoned property.

This evidence is sufficient to support Hough's conviction for Class D felony theft.

III. Double Jeopardy

Hough contends that the charging information and evidence used to convict him was so vague that the same evidence could be used to convict him of both burglary and theft. We note the State does not respond to this issue in its brief.

Hough argues that his burglary and theft convictions violate the Double Jeopardy Clause of the Indiana Constitution.[1] Whether convictions violate double jeopardy is a question of law which we review de novo. *Grabarczyk v. State*, 772 N.E.2d 428, 432 (Ind. Ct. App. 2002).

Article 1, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Two or more offenses are the "same offense" under Article 1, Section 14, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). Hough contends that his two convictions fail the actual evidence test. We disagree.

[1] Hough cites the federal constitution but does not make a cogent argument about its applicability to this case, waiving the issue. Ind. Appellate Rule 46(a)(8)(a). We therefore address only the Indiana Constitution.

Under the actual evidence test, the evidence adduced at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Id.* at 1234. To show the two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. *Id.* Application of this test requires the court to identify the essential elements of each of the challenged crimes and to evaluate the evidence from the fact-finder's perspective. *Id.*

In this case, the evidence used to convict Hough of the two charges was not the same. Burglary is committed when a person "breaks and enters a building or structure of another person, with intent to commit a felony in it . . . ." Ind. Code § 35-43-2-1. Theft is committed when a person "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 . . . ." Ind. Code § 35-43-4-2. For the Class C felony burglary charge, the State showed that Hough broke and entered Padgett's warehouse in order to steal items inside. For the Class D felony theft charge, the State showed that Hough actually took the items from inside the warehouse without permission and sold some of them to Hartford Metal & Iron.

We therefore find that the State established that Hough committed two separate offenses based on distinct facts. There is no reasonable possibility that the jury used the same evidentiary facts to establish both the essential elements of Class C felony burglary

and the essential elements of Class D felony theft. Because there is no double jeopardy violation, we affirm the trial court.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.