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IN THE
COURT OF APPEALS OF INDIANA

LESLIE SIMMONS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0703-CR-248
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0610-FC-209644

November 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Leslie Simmons appeals his convictions of class C felony burglary and class D felony attempted theft. He also challenges his six-year sentence for burglary. We affirm.

Issues

Simmons raises the following issues on appeal:

I. Whether the State presented evidence sufficient to rebut his claim of mistake of fact, and
II. Whether the trial court erred in sentencing him to six years for burglary.

Facts and Procedural History

The facts most favorable to the convictions indicate that shortly before noon on October 30, 2006, Michael Hinkle returned to his Indianapolis home after running an errand. While he was in the kitchen, he heard noises coming from his adjacent storage shed. When he went out to check the shed, he noticed that the door was open and its hinges were torn. A dresser had been removed from the shed and sat outside in the alley. Inside, he found his property in disarray and Simmons looking through items and putting them into crates. When Hinkle confronted him, Simmons claimed someone had given him permission to enter the shed. Hinkle told him that he had not authorized anyone to enter the shed or take his property. Simmons put the dresser back in the shed and quickly walked away. Hinkle later discovered that several items were missing from the shed.

Shortly thereafter, police apprehended Simmons, who told them an acquaintance, whom he knew as "Foul," had told him the owner wanted help cleaning out the shed. Simmons also told police that Foul had taken a compact disc player from Hinkle's residence. Police later found that Foul, whose real name is William Mitchell, was in possession of

several compact disc players. Hinkle did not know Mitchell either by his real name or his nickname and had never given permission for Mitchell or Simmons to enter his shed.

The State charged Simmons with class C felony burglary and class D felony attempted theft. The trial court found Simmons guilty as charged and sentenced him to six years' imprisonment for burglary and eighteen months for attempted theft, with sentences to run concurrently. This appeal ensued.

Discussion and Decision

I. Mistake of Fact Defense

Indiana Code Section 35-41-3-7 provides, "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." We have held that "[i]n order for mistake of fact to be a valid defense, three elements must be satisfied: (1) the mistake must be honest and reasonable; (2) the mistake must be about a matter of fact; and (3) the mistake must negate the culpability required to commit the crime." *Nolan v. State*, 863 N.E.2d 398, 404 (Ind. Ct. App. 2007) (citations and quotation marks omitted), *trans. denied*. In determining what constitutes an "honest" and "reasonable" mistake, "our supreme court has stated that '[h]onesty is a subjective test dealing with what appellant actually believed. Reasonableness is an objective test inquiring what a reasonable man situated in similar circumstances would do.'" *Id*. (quoting *Davis v. State*, 265 Ind. 476, 481, 355 N.E.2d 836, 839 (1976)).

Simmons contends that the State failed to present evidence sufficient to rebut his mistake of fact defense. The State has the ultimate burden of disproving a mistake of fact

defense beyond a reasonable doubt. *Ringham v. State*, 768 N.E.2d 893, 898 (Ind. 2002). Because the determination of whether the State met this burden is a question for the finder of fact, we review it using the same standard applicable to a sufficiency of evidence challenge. *Saunders v. State*, 848 N.E.2d 1117, 1121 (Ind. Ct. App. 2006), *trans. denied*. We neither reweigh evidence nor judge witness credibility. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Rather, we must consider only the probative evidence and reasonable inferences supporting the trial court's judgment. *Id*.

Simmons claims that on the day he entered Hinkle's shed, he was operating under the mistaken belief that he had permission both to enter the shed and to remove items from it. He specifically asserts that Mitchell told him that the owner said the two of them could keep whatever items they wanted if they cleaned up the shed. He therefore argues that he lacked the requisite intent necessary to commit burglary and attempted theft.[1]

In analyzing the reasonableness of Simmons's belief, we find no indication in the record that Simmons, prior to entering the shed, ever attempted to ascertain whether the owner was home or whether he might have specific instructions for the alleged cleaning project. Further, Hinkle testified that he kept the shed in a neat condition. A reasonable person certainly would wonder why he had been asked to clean up a shed that needed no

[1] Indiana's burglary statute states, "A person who breaks and enters the building or structure of another person, with *intent to commit a felony* in it, commits burglary, a Class C felony." Ind. Code § 35-43-2-1 (emphasis added). Indiana's theft statute provides, "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." Ind. Code § 35-43-4-2 (emphasis added). Indiana Code Section 35-41-5-1 defines a person's "attempt" as occurring "when, acting with the *culpability required for commission of the crime*, he engages in conduct that constitutes a substantial step toward commission of the crime." (Emphasis added).

such cleaning. It was only after Simmons rummaged through its contents that it was in a state of disarray. Such disarray also raises doubt as to the subjective honesty of Simmons's claim. The shed door was forcibly opened, and Simmons was found inside. The inference to be drawn therefrom is that Simmons was there not to clean the place up but to clean the place out. The fact that, once caught, Simmons offered to put the dresser back into the shed is more indicative of a desire to avoid further problems than of a truly mistaken belief in his right to take it. This, combined with his somewhat hasty exit, cuts against his claim of mistake of fact. We therefore affirm his convictions.

II. Sentencing

Simmons contends that the trial court erred in sentencing him to six years' imprisonment for class C felony burglary. "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." Ind. Code § 35-50-2-6. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Id*. Such abuse occurs only if the sentencing decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *Id*. (citations and quotation marks omitted). A trial court abuses its discretion "when the sentencing statement omits [aggravating or mitigating] reasons that are clearly supported by the record and advanced for consideration." *Id*. at 491.

Simmons specifically asserts that the trial court abused its discretion by failing to

consider his drug use as a mitigating factor. At the sentencing hearing, Simmons denied having a drug problem. He indicated that he was not under the influence of drugs at the time he committed the burglary and that he rarely had to pay for the drugs he used. As such, we find no abuse of discretion in the trial court's decision not to consider Simmons's drug use as a mitigator.

Simmons also contends that his six-year sentence is inappropriate and should be revised to the four-year advisory sentence. "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "[A] defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). "Although appellate review of sentences must give due consideration to the trial court's sentencing determination because of its special expertise in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Creekmore v. State*, 853 N.E.2d 523, 532 (Ind. Ct. App. 2006) (citations and quotation marks omitted), *trans. denied*.

Simmons argues that the nonviolent nature of the burglary and his purported mistake of fact render his six-year sentence inappropriate. We have already rejected his mistake of fact claim, and we note that class C felony burglary is inherently nonviolent. As for Simmons's character, he has a lengthy criminal history including felony convictions for robbery and burglary and misdemeanor convictions for larceny. He therefore has demonstrated a pattern of unwillingness to keep his hands off other people's property. This,

combined with his history of violating the conditions of release, supports the trial court's imposition of a six-year sentence. Simmons has failed to demonstrate that his sentence was inappropriate.

Affirmed.

DARDEN, J., and MAY, J., concur.