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IN THE
COURT OF APPEALS OF INDIANA

SAMUEL B. MARTIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A04-0603-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable G. Thomas Gray, Judge
Cause No. 55D01-0501-FC-10

November 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Samuel B. Martin appeals his convictions and sentence, after a trial by jury, on two counts of burglary, as class C felonies.

We affirm.

ISSUES

1. Whether the trial court erred when it ordered Martin to change from military to civilian attire for his trial.

2. Whether the trial court erred in instructing the jury.

3. Whether the trial court considered improper aggravating factors when it sentenced Martin.

4. Whether Martin's sentence is inappropriate.

FACTS

Martin, Shaun Parker, and James Ralph were friends, frequently riding motorcycles and engaging in other social activities together. During the winter, they would "hang out" at Parker's residence. (Tr. 158).

On the evening of November 22, 2004, the threesome met at Parker's house in Martinsville. They decided to go in Parker's truck to a house being constructed on Lot 25 at the Dynasty Estates North subdivision. Parker managed to open a rear basement garage door, and the three entered the house and determined what they wanted to remove. They decided that Martin would be the "lookout," to "watch and make sure nobody came down the drive to Dynasty." (Tr. 161). Therefore, Martin would need a separate vehicle. Parker drove them to Ralph's nearby residence; Ralph gave Martin the keys to his red Grand Prix; and they returned to Dynasty North. Martin drove the Grand Prix to the top

of a hill and watched, while Parker backed his truck into the driveway of Lot 25 and he and Ralph loaded a refrigerator, a dishwasher, and some other items into the back of Parker's truck. The threesome then drove back to Ralph's and left the refrigerator and dishwasher in his garage. Subsequently, the appliances were moved to Parker's. Shortly thereafter, Parker told Ralph and Martin that he had "sold" the stolen appliances "for $1100"; Parker gave Ralph $400, gave Martin $200, and kept $500. (Tr. 167).

Sometime after 10 p.m. on December 1, 2004, a truck nearly struck Martinsville Police Officer Joseph Neal's police car, which had its emergency lights activated while parked by the side of the road during a traffic stop. After Officer Neal concluded the stop, he followed the truck – which had a broken taillight. He pulled the truck over, determined that its occupants were Parker and Martin, and gave Parker a warning.

Later on the evening of December 1st, Parker and Martin went to Ralph's house. With Martin standing next to him, Parker told Ralph that they had earlier been to a house, "got some tools," and wanted him to go back with them. (Tr. 170). When Parker told Ralph that there were kitchen cabinets, Ralph agreed "because [he] needed kitchen cabinets for [his] kitchen." (Tr. 172). The three men drove to a house under construction on Lot 28 in the Patriot Place subdivision. Parker and Ralph were in Parker's truck, and Martin drove the red Grand Prix. They loaded trim, door moldings, and tools in the back of Parker's truck.

They drove away, with the trim hanging out the back of Parker's pick-up truck, and Martin following in the car. Driving through Martinsville, the men observed Officer Neal's police car at an intersection. When it turned behind them, Parker sped up and

Martin slowed, impeding Officer Neal behind him, and Parker proceeded to make a series of turns. As a result, Neal lost sight of Parker's truck. Parker and Ralph unloaded the contents of the truck in the yard of Parker's grandfather's house.

Martin met Parker and Ralph back at Parker's house. The three decided to use a red enclosed trailer at Ralph's house to move the stolen items from the yard of Parker's grandfather to Parker's house. They attached the trailer to Ralph's (larger) pick-up truck and proceeded to move the stolen items to Parker's. The three then went back to the house on Lot 28 at Patriot Place. There, they loaded the enclosed trailer full of kitchen cabinets, and put a microwave, dishwasher, and various tools in the back of the truck. While Martin finished loading these items, Parker and Ralph entered the house on Lot 29. Parker found some bathroom faucets, and they took them. The three returned in Ralph's truck to Parker's house and unloaded some of the stolen items. Ralph drove his truck with the box trailer full of cabinets home, and the three then left in Parker's truck.

Parker told Ralph and Martin that he needed some two-by-fours, and knew that some were at a job site in the Painted Hills subdivision. In Parker's truck, they went to the site and loaded two-by-fours in the back of the truck. They unloaded them at Parker's and drove back to the building site, where they took more. On the way back to his house, Parker made a wrong turn, and when he attempted to turn around in a driveway, the truck became lodged in a ditch.

Early on the morning of December 2, 2004, Morgan County Sheriff's Deputy Kenneth Garner was dispatched on a report of "a vehicle in a yard." (Tr. 247). He found

Parker, Ralph and Martin, with Parker's truck lodged in the ditch. Garner called a wrecker to tow the truck.

On December 9, 2004, a search warrant was executed for Ralph's house, and a dishwasher and cabinets matching the description of those reported stolen from the house on Lot 28 were found. Also on December 9th, Morgan County Sheriff's Department detectives talked with Martin. Martin told them that he had met Parker at a restaurant late one evening, and Parker asked him to go with him to look inside a home under construction to see if there was anything that they could take. Martin also told him that much later that evening he had met with Parker and Ralph, and they had gone out to shine a spotlight on deer. Martin stated that subsequently, their vehicle became stuck in a driveway near Painted Hills, and he fell asleep. When a detective asked him about the burglaries, Martin "sat up in his chair" and "began to kind of well up a little bit in the eyes," and asked, "[I]f I tell you information about the burglaries, can I leave town?" (Tr. 426). The detective told him that he could "do whatever [he]'d like to do" and asked if there was "some reason [he]'d like to leave town." *Id.* Martin then ended the interview.

Several days later, Ralph's attorney contacted authorities about Ralph providing a statement. An agreement was reached with the prosecutor, whereby Ralph would give a statement and testify against Parker and Martin, and the State would charge Ralph with one count of burglary as a class B felony. Ralph gave a statement on December 15, 2004, and later that day a search warrant was executed on Parker's house. There, authorities found more items that had been reported stolen. On January 5, 2005, Parker was charged with six counts of burglary, two counts of dealing in a controlled substance, and two

counts of theft. Also on January 5, 2005, the State charged Martin with three counts of burglary, as class C felonies – specifically, the breaking and entering of the house on Lot 25, Dynasty North, the house on Lot 28, Patriot Place, and the house on Lot 29, Patriot Place, all with the intent to commit theft.

A jury trial was held December 6 – 8, 2005. On the first morning of trial, Martin appeared in his U.S. Army uniform.[1] During a break in *voir dire*, a deputy prosecutor who also was in the JAG Corps observed Martin's attire; this deputy prosecutor then joined the deputy prosecutor trying the case in bringing the matter to the trial court's attention. The trial court was informed that it was improper for Martin to wear his military uniform when he was a criminal defendant in a civilian trial. The State asked that Martin be instructed not to wear the uniform and that in order to cure any "prejudice[] as a result of his dress," the jury be instructed that doing so was improper. After discussion with counsel, the trial court suggested that the jury be instructed that the uniform "is improper in a civilian court, and the Court has ordered Mr. Martin not to wear it any more" and that "the jurors shall not consider that fact of him wearing it or the Court ordering him not to wear it anymore in their fact-finding mission in this case." (Tr. 50-51). Martin's counsel responded that he "wouldn't have a problem with that." (Tr. 51). In a subsequent discussion about the jury instructions, "the military uniform issue" instruction was mentioned by the trial court, and Martin's counsel stated, "No objection." (Tr. 133). As one of the preliminary instructions, the jury was advised as follows:

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[1] Martin was serving in the Army Reserve and was not on active duty.

> The wearing of a military uniform during a civilian trial is not proper. The Court has instructed Mr. Martin not to wear his uniform . . . his military uniform. You should not consider the wearing of the uniform or the Court's instruction not to wear the uniform as part of your fact-finding mission in this case.

(Tr. 139).

At trial, Ralph testified to the aforementioned facts, along with Officer Neal, Deputy Garner, and the detectives. Other witnesses identified property found pursuant to the search warrants as stolen from the Dynasty house and the two Patriot Place houses. At the conclusion of the State's case-in-chief, Martin moved for judgment on the evidence as to the burglary at the house on Lot 29, Patriot Place. His motion was granted. The jury found Martin guilty of the burglary of the house on Lot 25, Dynasty North, and the house on Lot 28, Patriot Place.

The sentencing hearing was held on January 13, 2006. Martin was sentenced to three years imprisonment on Count I, and to four years on Count II. The trial court ordered the sentences to be served concurrently, and it suspended the sentence on Count II except for the time that Martin had already served.

DECISION

1. Courtroom Attire

Martin first argues that the trial court "erred in ordering [him] to remove his military uniform and proceed in civilian dress after commencement of his trial." Martin's Br. at 8. According to Martin, because due process "constitutionally clothe[s] a Defendant with a presumption of innocence," once he appeared in his uniform and trial

began, the order that he change his dress "violated [his] presumption of innocence." *Id.* at 8, 9. We cannot agree.

Martin cites no authority for the proposition that he is entitled to wear attire of his choosing for trial. Moreover, Indiana's trial courts are vested with "broad discretion in the conduct of a proceeding." *Roche v. State*, 690 N.E.2d 1115, 1131 (Ind. 1997). Thus, the appellate court "will not find error on the part of the trial court's conduct of a proceeding in the absence of a clear violation of procedural rule or unfair prejudice." *Id.* Martin cites no procedural rule that would entitle him to continue to wear the military attire in which he first appeared for trial. Further, the trial court informed the jury that *it had required* Martin to change to civilian attire, and it expressly instructed the jury *not to consider* either "the wearing of the uniform or the Court's instruction not to wear the uniform" as it determined the facts. (Tr. 139). Therefore, we cannot find any unfair prejudice suffered by Martin as a result of his having been ordered to wear civilian attire.

2. Instruction

Martin next argues that the trial court erred when it gave the jury the preliminary instruction stating "that Mr. Martin's actions in wearing a military uniform were improper." Martin's Br. at 12. We disagree.

As Martin acknowledges, the manner in which a jury is instructed rests with the trial court's discretion. *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005).[2] We review the trial court's instruction of the jury for an abuse of that discretion. *Overstreet v. State*, 783

[2] Martin cites Mitchell v. State, 821 N.E.2d 390, 395 (Ind. Ct. App. 2004), for this proposition, but that opinion was vacated when Indiana's Supreme Court issued Mitchell v. State, 844 N.E.2d 88 (Ind. 2006) several months before the date of his brief.

N.E.2d 1140, 1163-64 (Ind. 2003), *cert. denied* 540 U.S. 1150. An abuse of the trial court's discretion "occurs when the instructions as a whole mislead the jury as to the law in the case." *Ham*, 826 N.E.2d at 641 (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)). Further, "the law is settled that failure to object to a jury instruction given by the trial court waives the issue for review." *Fisher v. State*, 810 N.E.2d 674, 677 (Ind. 2004).

Martin asserts that he did object to the instruction. However, the record fails to clearly establish an objection by Martin to the trial court's instruction on the wearing of the uniform. As indicated above, when the trial court proposed instructing the jury that the wearing of a military uniform in a civilian court was improper, and that neither the fact of Martin's wearing -- or his having been ordered not to wear it -- should be considered by the jury as it found the facts of the case, Martin's counsel expressly stated that he "wouldn't have a problem with that." (Tr. 51). During a later discussion of preliminary instructions, the trial court first discussed the State's two proposed instructions. As to "Number 1, the aiding, abetting or inducing," Martin objected. (Tr. 131). Next, the trial court raised Number "2, the military uniform issue" instruction, and Martin's counsel stated, "No objection." (Tr. 133). The trial court then stated that "1 and 2 will be given over objection." *Id.* Thus, we do not find it clear that Martin raised an objection to the trial court giving an instruction regarding the wearing of a military uniform in a civilian trial.

Further, the instruction at issue directs the jury to *not* consider Martin's wearing of the uniform or his being ordered not to wear it when it undertook its "fact-finding mission in this case." (Tr. 139). The jury was also preliminarily instructed that its "duty"

was "to determine the facts of the case from the testimony presented and exhibits admitted as evidence," and "to decide this case only upon the evidence produced in open court and reasonable inferences arising therefrom." (Tr. 142, 143).[3] The trial court properly instructed the jury that it was to find the facts of the case based solely upon the evidence presented. Therefore, the instructions as a whole did not mislead the jury as to the law, and we find no abuse of discretion. *See Ham*, 826 N.E.2d at 641.

3. Improper Aggravating Factors

Next, Martin asserts that the trial court "improperly considered [his] claim of innocence as an aggravating factor for purposes of sentencing," and that "the court's determination that Mr. Martin did not testify truthfully at trial should not have been considered as an aggravator." Martin's Br. at 13, 15. Again, we cannot agree.

Sentencing decisions rest within the discretion of the trial court and are reviewed only for an abuse of that discretion. *Jones v. State*, 812 N.E.2d 820, 826 (Ind. Ct. App. 2004). When the trial court imposes the statutory presumptive sentence, it is not required to list aggravating or mitigating factors; it must set forth its reasoning only when deviating from the statutory presumptive sentence. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (citing *Jones v.* State, 698 N.E.2d 289, 290 (Ind. 1998)). Thus, when the trial court imposes a sentence other than the presumptive sentence, or imposes consecutive sentences, the appellate court examines the record to insure that the trial

[3] The trial court's final instructions to the jury included reference to "the preliminary instructions, which [would] not be reread" but "should be considered" and would be provided to the jury in writing for its deliberations. (Tr. 597).

court explained its reasons for selecting the sentence imposed. *Childress*, 848 N.E.2d at 1080 (quoting *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2005)).

Martin was convicted of two class C felony offenses. At the time Martin committed these offenses, the sentencing range for a class C felony offense was from two to eight years, with four years being the presumptive term. *See* Ind. Code § 35-50-2-6. The trial court sentenced Martin to serve concurrent terms of three years on the first offense and four years on the second. Thus, because Martin was not ordered to serve a term greater than the presumptive, the trial court was not required to list aggravating factors.

Nevertheless, the trial court did find as "aggravating circumstances that these crimes were committed on two separate nights, allowing [Martin] the time to reflect." (Tr. 653). It further found that Martin's attempts "to use a military ID . . . to try to get out of things" to be "an aggravator in this case." (Tr. 655).[4] Although the trial court noted that Martin's demeanor as a witness led "twelve people of the community" and the trial court to not believe his testimony, (Tr. 653), and that Martin had never apologized for the crimes, the trial court nevertheless did not find these as aggravating factors; nor, as indicated above, did the trial court order Martin to serve a term greater than the presumptive sentence. Therefore, we find no abuse of discretion here.

3. Inappropriate Sentence

[4] Both Officer Neal and Deputy Garner testified that when asked for identification, Martin had shown his military ID.

Finally, Martin argues that his sentence is "inappropriate under Ind. App. R. 7(B)." Martin's Br. at 16. We cannot agree.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision," we find "that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). Indiana's Supreme Court explained in *Childress*, 848 N.E.2d at 1080, that the Rule is "the vehicle through which" appellate courts exercise the constitutional grant of authority "to revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender." (emphasis in original). Moreover, "the Rule articulates a standard of review designed as guidance for appellate courts." *Id.*

Regarding the nature of the offense, we begin with the presumptive sentence – being that which the legislature has selected as an appropriate sentence for the crime committed. *Id.* Here, the presumptive sentence of four years was precisely what the trial court ordered for the second offense; and for the first offense, the sentence imposed was one year less than the four-year presumptive term.

As to the character of the offender, *id.*, the trial court recognized that Martin "ha[d] no prior criminal record." (Tr. 652). However, the trial court also found that Martin "took away [the Dynasty Lot 25 homeowner's] sense of security" when he broke and entered her home, and had also "violated [the Patriot Place Lot 28 homeowner's] sense of security." (Tr. 652, 653). Further, as already indicated, the trial court found that

these two offenses were committed "on two separate nights, allowing [Martin] time to reflect." (Tr. 653).

Based upon the evidence presented, we conclude that the sentence imposed is not inappropriate in light of the nature of the offense and character of the offender.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.