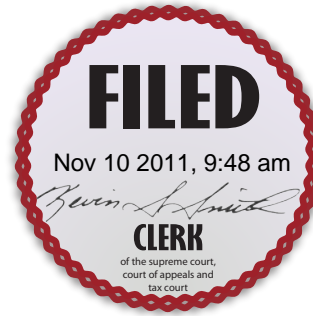


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHNNY RAY FOSTER,)
)
 Appellant-Defendant,)
 Cross-Appellee,)
)
 vs.)
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)
 Cross-Appellant.)

No. 81A01-1103-CR-157

APPEAL FROM THE UNION CIRCUIT COURT
The Honorable Matthew R. Cox, Judge
Cause No. 81C01-1006-FB-112;81C01-0907-FD-203

November 10, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Johnny Ray Foster appeals his convictions for Burglary¹, a class B felony; Burglary,² a class C felony; Theft,³ a class D felony; and Criminal Gang Activity,⁴ a class D felony. Specifically, Foster contends that the evidence was insufficient to support his convictions. The State also cross-appeals, arguing that Foster's sentence was illegal because the trial court imposed a separate sentence for the habitual offender finding. Finding that the evidence was sufficient but that the trial court incorrectly sentenced Foster, we affirm in part, reverse in part, and remand with instructions to correct the sentencing order.

FACTS

On June 8, 2010, Hubert Bolser returned to his residence in rural Union County to find that both his house and barn had been burglarized. Both Bolser and his wife had been at work when the burglary occurred. He called the Union County Sheriff's Office to report the burglary. Union County Sheriff's deputies arrived to collect evidence and catalog what was taken.

The following day, Union County Deputy Dale Dishmund spoke with Juanita Dils, a neighbor of the Bolsers. Dils informed Deputy Dishmund that, on the day of the

¹ Ind. Code § 35-43-2-1.

² I.C. § 35-43-2-1.

³ I.C. § 35-43-4-2(a).

⁴ I.C. §35-45-9-3; I.C. 35-45-9-1(1)(B).

burglary, she had witnessed a suspicious truck with three people inside parked outside of her home. One of the men in the truck had walked around to the back of her house and onto her deck. She confronted the man, who then claimed to know someone in Liberty. She gave him directions to Liberty, and then he got back into the truck and drove away. At Foster's trial, Dils identified the man she had spoken with as Charles Jones.

On June 15, 2010, Tina Hartman noticed that a truck had parked in front of her house in Liberty. She observed that a female was driving the truck and at least two others were passengers in the truck. She immediately contacted her neighbor, Laurel Police Officer Christopher Laird. In plain clothes, Officer Laird approached what he identified as a silver Dodge truck. He observed a female in the driver's seat and two male passengers. Officer Laird asked them what they were doing, and the driver replied that they were waiting on their friend "Johnny." Officer Laird then ordered them to leave the area, and they obeyed.

After quickly returning home to get his police identification and patrol car, Officer Laird followed the truck to a nearby Shell Station. He contacted the Liberty Police Department for back-up and then approached the truck to again speak with its occupants. Liberty Police Officer Russell Burroughs and Deputy Dishmond, the officer involved in the Bolser burglary investigation, arrived at the Shell Station shortly thereafter.

Deputy Dishmond suspected that the truck was the same truck reported to have been involved in the Bolser burglary. The officers identified the occupants of the truck at that time as Kaitlin Tipton, Charles Jones, and Chris Ervine. They then obtained consent

for and executed a search of the vehicle. The officers found several pairs of gloves, a wallet belonging to Foster, drugs, gas cans, and several other items. The police arrested all three occupants for possession of narcotics and transported them to the Union County jail.

During questioning, Tipton confessed to the police that she, Jones, and Foster had burglarized the Bolser residence on June 8, 2010. At the time of the interview, she had in her possession jewelry reported stolen from the Bolser's. Jones also confessed to burglarizing the residence. As part of a plea agreement, Tipton and Jones both pleaded guilty to two counts of burglary and one count of criminal gang activity. The agreement also required that they testify at Foster's trial regarding the burglary of the Bolser residence.

On June 17, 2010, the State charged Foster with Count I, burglary, a class B felony; Count II, burglary, a class C felony; Count III, theft, a class D felony; and Count IV, criminal gang activity, a class D felony. The State later added a habitual offender count.

At trial, both Tipton and Jones provided testimony that Foster participated in the burglarizing the Bolser residence. Jones testified that he, Tipton, and Foster met on June 8, 2010 with the intent to burglarize homes. Tipton testified that he drove the men in the silver Dodge pickup and dropped the two men off at the Bolser home to burglarize it. Foster knocked on the door to determine whether anyone was home. Receiving no answer, Jones then kicked in the door of the Bolser home, and he and Jones entered.

Wearing the same gloves found in the truck, both men took several items from the home. Jones also stated that he kicked in the door of the Bolser's barn and took a gas can. Additionally, he testified that he sold items taken from the Bolser home and gave some of the money to Foster.

Following the trial, the jury found Foster guilty on all four counts. Foster admitted to being a habitual offender. For the four underlying offenses, the trial court sentenced Foster to concurrent terms in the Department of Correction resulting in an aggregate sentence of twenty years. On the habitual offender finding, the trial court sentenced Foster to twenty years in the Department of Correction and specifically ordered that sentence be served consecutive to the sentences for the underlying offenses.

Foster now appeals.

DISCUSSION AND DECISION

I. Sufficiency

Foster primarily argues that the State failed to present sufficient evidence to support his convictions because the only evidence presented was the testimony of his accomplices Tipton and Jones and that the jury failed to highly scrutinize that testimony. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of witnesses. Griffin v. State, 945 N.E.2d 781, 783 (Ind. Ct. App. 2011). In addition, we only consider the evidence most favorable to the verdict and the reasonable inferences stemming therefrom. Id. We will only reverse a conviction when

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

Foster concedes that “a person may be convicted based on the uncorroborated testimony of an accomplice.” Appellant’s Br. p. 6, (quoting Garland v. State, 444 N.E.2d 1180, 1182 (Ind. 1983)). Moreover, although the testimony of an accomplice, such as Tipton and Jones, is subject to high scrutiny, such testimony may be by itself sufficient to sustain a conviction. Dixon v. State, 865 N.E.2d 704, 714 (Ind. Ct. App. 2007). The fact that an accomplice was granted a benefit by the State in order to encourage such testimony goes to the weight and credibility of the witnesses, which is entirely within the province of the jury and will not be reviewed on appeal. Gregory v. State, 885 N.E.2d 697, 706 (Ind. Ct. App. 2008).

Here, the prosecutor extensively questioned both witnesses as to his or her respective plea deals at the beginning of their testimony. Tr. 245-47, 268-69, 280-81, 283-85, 300. The jury was fully informed of the plea deal that the two witnesses received and, thus, was able to incorporate such information into its analysis of the credibility of the two witnesses. Gregory, 885 N.E.2d at 706.

In support of his contention that the jury failed to highly scrutinize Tipton’s and Jones’s testimony, Foster argues that the jury failed to recognize that the evidence is insufficient to support his conviction on Count II for burglary as a class C felony because there is no evidence that he entered the barn or possessed any of the items removed from

the barn. Further, he argues that Jones, the lone eyewitness to the burglary, testified that Foster never entered the barn.

We observe, however, that the jury was instructed on accomplice liability, and, thus, we will consider whether there was sufficient evidence to support the conviction on Count II for burglary under the theory of accomplice liability. Foster need not have participated in every element of the offense to be found guilty. Green v. State, 937 N.E.2d 923, 927 (Ind. Ct. App. 2010). In determining whether there was sufficient evidence for purposes of accomplice liability, we will consider such factors as: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose commission of crime; and (4) course of conduct before, during, and after occurrence of crime. Hyché v. State, 934 N.E.2d 1176, 1179 (Ind. Ct. App. 2010).

Here, Jones and Tipton testified at trial that he met with Foster on June 8, 2010, with the purpose of burglarizing homes. Tr. 249, 286. They drove in a Dodge Ram truck to the Bolser residence. Tr. 249, 287. While Tipton remained in the truck, Foster knocked on the door to see if anyone was home. Tr. 254. Jones kicked in the door to the Bolser residence, and both he and Foster entered and took various items from within the home. Tr. 288. Jones then kicked in the door to the barn and stole a can of gasoline. Tr. 291-92. Foster's presence at the crime scene, companionship with Jones, and conduct all support his conviction under the theory of accomplice liability. Therefore, the evidence is sufficient to support his conviction for burglary as a class C felony.

In regards to Foster's challenges to the remaining three convictions, his argument ignores our standard of review. For each, Foster challenges the sufficiency of the evidence, but then admits that evidence was presented through the testimony of either Tipton or Jones. Appellant's Br. p. 6. Foster is requesting that we reweigh the evidence and judge the credibility of the witnesses because they are accomplices turned State's witnesses. This, we will not do. Gregory, 885 N.E.2d at 706. Therefore, we find that the evidence was sufficient to support Foster's convictions on all counts. Furthermore, any alleged discrepancies in their respective testimonies are a matter for the jury's determination. "It is for the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve." Kilpatrick v. State, 746 N.E.2d 52, 61 (Ind. 2001).

II. Sentencing

On cross appeal, the State argues that the trial court erred when it illegally imposed the habitual offender enhancement as a separate sentence. Where the trial court has imposed an illegal sentence, the State has a right to appeal that sentence. Hardley v. State, 905 N.E.2d 399, 400 (Ind. 2009).

A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. Davis v. State, 935 N.E.2d 1215, 1218 (Ind. 2010). Rather, it results in a sentence enhancement imposed upon the conviction of a subsequent felony. Id. In the event of simultaneous multiple felony convictions and a finding of habitual offender status, trial courts must impose the resulting penalty enhancement upon only one

of the convictions and must specify the conviction to be enhanced. Greer v. State, 680 N.E.2d 526, 527 (Ind.1997).

Here, the trial court imposed a sentence of twenty additional years to be served consecutively to the sentence imposed on the underlying offenses. Appellant's App. p 358. In doing so, the trial court imposed an illegal, separate sentence instead of an enhancement on one of the underlying offenses. Therefore, we remand with instructions that the trial court enter the sentence as an enhancement of one of the convictions. Davis, 935 N.E.2d at 1218.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to enter the sentence on the habitual offender count as an enhancement of one of the convictions.

KIRSCH, J., and BROWN, J., concur.