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IN THE COURT OF APPEALS OF INDIANA

Jesse E. Atwood,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 7, 2021

Court of Appeals Case No. 20A-CR-2391

Appeal from the Shelby Superior Court

The Honorable R. Kent Apsley, Judge

Trial Court Cause No. 73D01-1906-F3-11

Brown, Judge.

[1] Jesse E. Atwood appeals his conviction for corrupt business influence as a level 5 felony and claims the evidence is insufficient to support the conviction. We affirm.

Facts and Procedural History

[2] Atwood sold methamphetamine to a confidential informant (the "CI") on four occasions during September and October of 2018. On September 20, 2018, the CI went to a bedroom window at a house on Indiana Avenue in Shelbyville, saw Atwood and his girlfriend J.D., received methamphetamine from Atwood, and handed eighty dollars in cash to Atwood. On September 21, 2018, the CI returned to the house on Indiana Avenue and went inside where Atwood placed methamphetamine in a baggie, tied it, and handed it to J.D. who in turn handed it to the CI, and the CI handed eighty dollars to J.D. who handed the money to Atwood. At some point, the CI ran into Atwood and M.D. at a gas station, and Atwood told the CI that he was staying at M.D.'s house and "if [the CI] was needing something to come by there and get it." Transcript Volume II at 215. On October 18, 2018, the CI went to M.D.'s house on Miller Avenue in Shelbyville, Atwood answered the door and the CI went inside, Atwood, M.D., and the CI went into a room, the CI gave M.D. eighty dollars who in turn handed it to Atwood, Atwood placed the money in his pocket, and Atwood gave the methamphetamine to M.D. who in turn gave it to the CI. On October 25, 2018, the CI returned to the house on Miller Avenue and knocked, Atwood answered the door, the CI saw that M.D. was asleep on the bed, Atwood handed methamphetamine to the CI, and the CI gave eighty dollars to

Atwood who placed the money in his pocket. When asked at trial if he remembered anything about his conversation with Atwood, the CI stated: "There was conversations, his, his drug dealer and everything and his guy running out and him having to re-up his guy and then he was gonna go buy a zip, and, which is an ounce, and try and flip it." *Id*. at 226-227.

[3] The State charged Atwood with dealing in methamphetamine as a level 3 felony, four counts of dealing in methamphetamine as level 4 felonies, and corrupt business influence as a level 5 felony,[1] and it alleged he was an habitual offender. The court held a bench trial at which Atwood represented himself, and the court found him guilty of four counts of dealing in methamphetamine and corrupt business influence as level 5 felonies, found him not guilty of dealing in methamphetamine as a level 3 felony, and found that he was an habitual offender. The court sentenced him to concurrent terms of six years with one year suspended for each of his convictions and enhanced his sentence for one of the dealing in methamphetamine convictions by five years for being an habitual offender for an aggregate sentence of eleven years with one year suspended.

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[1] The charging information for corrupt business influence alleged:

> between September 20, 2018 and October 25[,] 2018, Jesse Atwood, through a pattern of racketeering activity, did knowingly or intentionally acquire or maintain, either directly or indirectly, an interest in or control of property or an enterprise, and/or did receive proceeds directly or indirectly derived from a pattern of racketeering activity, and did use or invest those proceeds or the proceeds derived from them to acquire an interest in property or to operate an enterprise . . . .

Appellant's Appendix Volume II at 31.

Discussion

[4] When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id*. When confronted with conflicting evidence, we must consider it most favorably to the trial court's ruling. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id*. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id*. at 147.

[5] "[A]fter Congress enacted the Federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 (2012), Indiana enacted its own RICO Act, which is otherwise known as the Indiana Corrupt Business Influence Act, Ind. Code §§ 35-45-6-1 to -2 (2008)." *Jackson v. State*, 50 N.E.3d 767, 771 (Ind. 2016). Ind. Code § 35-45-6-2 provides:

> A person:
>
> > (1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise;
> >
> > (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of property or an enterprise; or

> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;
>
> commits corrupt business influence, a Level 5 felony.

[6] Ind. Code § 35-45-6-1(d) provides:

> "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents. However, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

Racketeering activities include, among other offenses, dealing in methamphetamine. *See* Ind. Code § 35-45-6-1(e)(29). Also, "property" means "anything of value," and the term includes money. Ind. Code § 35-31.5-2-253(a)(2).

[7] Atwood asserts the State failed to present sufficient evidence to show that he committed corrupt business influence. Atwood states that he "does not dispute that his multiple deals with the confidential informant was a pattern of racketeering activity," but argues "the State must still prove that it is connected to the acquiring or maintaining of an interest in or control of property or an enterprise." Appellant's Brief at 8. He argues: "Nearly every drug transaction involves the exchange of money or other property for drugs. If merely

obtaining money as part of the transactions constituted corrupt business influence, then a defendant participating in two or more controlled buys would always be guilty of corrupt business influence as well as the underlying transactions." *Id*. at 9. He cites *Robinson v. State*, 56 N.E.3d 652 (Ind. Ct. App. 2016), *trans. denied*, and argues "Indiana's RICO Act intended to target organized crime, not a lone drug dealer." *Id*.

[8] The State maintains that Atwood's control of the cash after each of the four drug deals is sufficient to sustain his conviction and that repeated drug dealing is the type of criminal activity that the corrupt business influence statute was designed to target. It argues that Atwood encouraged the CI to contact him again after the two had a chance meeting at a gas station, that during the last controlled buy Atwood told the CI that he was planning to buy an ounce of methamphetamine to sell, and that "[h]is participation in repeated drug deals and his expressed interest in increasing the amount of methamphetamine he wanted to sell demonstrate that his crimes pose a greater risk to society than random crimes." Appellee's Brief at 9. It also asserts Atwood's criminal activity was substantially different than that in *Robinson*.

[9] In *Jackson*, the defendant was convicted of corrupt business influence for his involvement in three armed robberies during the course of a month. 50 N.E.3d at 769. On appeal, the defendant argued the State failed to prove the robberies constituted a pattern of racketeering activity because there was insufficient evidence they posed a threat of continued criminal activity. *Id*. The Indiana Supreme Court observed the Indiana RICO statute defines a

pattern of racketeering activity as two incidents of racketeering activity "that are *not isolated* incidents," *id*. at 775 (citing Ind. Code § 35-45-6-1(d)), the statute "does not apply to sporadic or disconnected criminal acts," and "although failure to prove continuity is not necessarily fatal to a corrupt business influence conviction—since it is not a separate element in the statute—the State must still demonstrate that the criminal incidents were in fact a 'pattern' and not merely 'isolated' incidents." *Id*. at 775-776. It noted that, "[i]n some cases, proving that two or more criminal incidents are not isolated will be straightforward, as the very nature of the crimes will suggest that they are not sporadic" and, "[i]n others, the proof may be more elusive, perhaps indicating that the State is overreaching in its attempt to obtain a conviction under the Indiana RICO Act." *Id.* at 776.

[10] The Court found the defendant's armed robberies took place within the mandated time frame, "[a]ll that remain[ed was] whether the State proved the incidents were 'not isolated,'" and "[u]nless no reasonable fact-finder could find this proven beyond a reasonable doubt, [it] must affirm." *Id*. at 776. The Court held that, even though the robberies took place within a short time frame, the nature of the operation demonstrated the crimes were not sporadic and would have likely continued into the future had the operation not been interrupted by the apprehension of the defendant's accomplices; the defendant was the mastermind behind each robbery, plotting the crimes and supervising his recruits; his coordination of the crimes became more sophisticated over time; there was no indication that he would have stopped after the third robbery and

the evidence pointed to the opposite conclusion; and the fact-finder could reasonably infer the crimes were not isolated or sporadic. *Id*. at 776-777.

[11] In *Robinson*, the defendant was convicted of corrupt business influence after he went to a Walmart on two separate occasions less than a month apart and stole or attempted to steal parts from a home security camera system box. 56 N.E.3d at 655-656. On appeal, this Court concluded the State did not present sufficient evidence to sustain his conviction for corrupt business influence. *Id.* at 659-660. We observed the defendant twice shoplifted or attempted to shoplift similar items from the same store, there was no evidence that he acquired any property through racketeering activity other than the items he stole or attempted to steal, and there was no evidence of extensive planning, increasing sophistication, or the enlistment of any accomplices, and we found the crimes were isolated and sporadic. *Id*. at 659. We also stated:

> We simply do not believe the commission of two acts of shoplifting of this type is the kind of activity our legislature meant to be covered by our RICO statute. We have previously observed that our RICO statute was designed to address the more sinister forms of corruption and criminal activity . . . . RICO is structured to reach and punish these diabolical operations that are a greater threat to society than random theft. Additionally, we have described the intent behind RICO laws as permitting cumulative punishment and to seek eradication of organized crime . . . . RICO laws were designed to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.

Id. at 659-660 (footnotes, internal quotation marks, and citations omitted). We concluded the defendant did not fit the definition of someone involved with any kind of organized crime and declined to apply the RICO statute.[2] *Id.* at 660.

[12] In *Purvis v. State*, the defendant challenged his conviction for corrupt business influence, cited *Robinson*, and argued that Indiana's RICO statute did not apply to him. 87 N.E.3d 1119, 1128 (Ind. Ct. App. 2017), *adhered to on reh'g*. We found the facts were distinguishable from *Robinson* and noted the defendant stole or attempted to steal dozens of games to resell for profit, he did not steal a game or two simply to play them at home, and he and his accomplices demonstrated significant planning as they arrived at the video game section with a ready-made place to conceal the games and hid the games across the store. *Id*. In response to the defendant's assertion his conduct was "not the type of crime that the RICO Act is intended to punish" and his reliance on *Robinson*, we found the defendant's "conduct satisfied the clear, unambiguous language of the statute, which is the best indicator of legislative intent." *Id*. at 1128 n.8 (citation omitted).

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[2] Judge Altice dissented and wrote:

> [B]y the plain language of the statute, two acts of theft—even shoplifting—*can* support a RICO conviction. Moreover, the provision of the RICO Act under which Robinson was charged does *not* require that he act in concert with others in any sort of criminal enterprise. If the legislature wished to limit the reach of the RICO Act to more sophisticated criminals and members of organized crime syndicates like Lucky Luciano or Carlo Gambino, it could easily have done so.

Robinson, 56 N.E.3d at 661 (Altice, J., concurring in part and dissenting in part). The Indiana Supreme Court denied the petition for transfer, and Justice David and Justice Massa voted to grant the petition for transfer. *See* 59 N.E.3d 252 (Ind. 2016).

[13] Here, Atwood's four methamphetamine transactions constituted a pattern of racketeering activity under Ind. Code § 35-45-6-1 and -2, which he does not dispute. Indeed, the court as the fact-finder could reasonably infer that the crimes were not isolated or sporadic. Atwood sold methamphetamine on four occasions from two residences and, during the most recent meeting with the CI, made a comment that he was "gonna go buy a zip . . . and try and flip it." Transcript Volume II at 227. The trier of fact could reasonably conclude based on the nature of the crimes and Atwood's conduct and comments that the criminal activity would have likely continued had it not been interrupted. As to whether Atwood "acquire[d] or maintain[ed] . . . an interest in or control of property," Ind. Code § 35-45-6-2, the record reveals that he received cash as a part of each of the four methamphetamine transactions. We note that the Indiana RICO statute used to apply to persons who acquired or maintained "an interest in or control of *real* property or an enterprise," and that, in 1991, the legislature eliminated the word "real" from the statutory language. *See* Pub. Law No. 211-1991, § 9 (emphasis added). Moreover, the legislature has specifically defined the term "property" to mean "anything of value" and provided that the term includes "money."[3] *See* Ind. Code § 35-31.5-2-253(a)(2). The statutory language is the best indicator of legislative intent, *Purvis*, 87 N.E.3d at 1128 n.8, and we must affirm unless no reasonable fact-finder could

[3] The term also includes, among other things, "a gain or advantage or anything that might reasonably be regarded as such by the beneficiary"; personal property; labor and services; intangibles; commercial instruments; written instruments concerning labor, services, or property; extension of credit; and food and drink. *See* Ind. Code § 35-31.5-2-253.

find the elements of the crime proven beyond a reasonable doubt. *Jackson*, 50 N.E.3d at 776; *Drane*, 867 N.E.2d at 146. The State presented evidence of probative value from which a reasonable trier of fact could find beyond a reasonable doubt that Atwood, through a pattern of racketeering activity, knowingly or intentionally acquired or maintained an interest in or control of property. *See Long v. State*, 867 N.E.2d 606, 613-614 (Ind. Ct. App. 2007) (affirming the defendant's conviction for corrupt business influence where he engaged in a pattern of racketeering activity in committing two acts of theft and received payments by check for products he agreed to sell but never delivered), *reh'g denied*; *Chavez v. State*, 722 N.E.2d 885, 895 (Ind. Ct. App. 2000) (affirming the defendant's conviction for corrupt business influence based on the predicate offenses of dealing, and possessing with intent to deliver, illegal drugs), *reh'g denied*.

[14] The facts of this case are distinguishable from those in *Robinson*. Unlike in *Robinson*, where the defendant's two offenses related to shoplifting camera parts were isolated and sporadic and there was no evidence of any resale, here the evidence demonstrates that Atwood's multiple crimes for dealing in methamphetamine were not isolated or sporadic and that he acquired money by selling or flipping the drugs. Also, even if the shoplifting offenses in *Robinson* were not the kind of activity the legislature meant to be covered by the Indiana RICO statute, there is no question that Atwood's conduct of repeatedly dealing in methamphetamine to acquire money satisfied the unambiguous language of the statute. *See Purvis*, 87 N.E.3d at 1128 (distinguishing *Robinson*, noting the

defendant stole items to resell for profit, and holding the defendant's conduct satisfied the language of the RICO statute).[4]

[15] For the foregoing reasons, we affirm Atwood's conviction for corrupt business influence as a level 5 felony.

[16] Affirmed.

Bradford, C.J., concurs.

Vaidik, J., dissents with opinion.

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[4] The dissenting opinion states that the word "property" in the Indiana RICO statute should not be construed to include "the small amount of cash that changes hands in a garden-variety drug deal," that Atwood is "more like a Robinson than a Luciano or Gambino," and that "RICO is meant for people at or near the top of the chain of command." However, this Court must apply the unambiguous language of the Indiana RICO statute. *See Moore v. State*, 949 N.E.2d 343, 345 (Ind. 2011) ("Whether conduct proscribed by a criminal law should be excused under certain circumstances on grounds of public policy is a matter for legislative evaluation and statutory revision if appropriate. The judicial function is to apply the laws as enacted by the legislature."). The legislature has determined that dealing in methamphetamine constitutes a "racketeering activity," *see* Ind. Code § 35-45-6-1(e)(29), and the Indiana RICO statutes do not require that a person acquire or maintain a certain value or amount of property. By the plain language of the statute, multiple acts of dealing in methamphetamine, even for a relatively small amount of cash, may support a RICO conviction. If the legislature wished to limit the reach of the RICO statute to more sophisticated criminals or persons who deal in larger amounts of methamphetamine, it could have done so.

IN THE
COURT OF APPEALS OF INDIANA

Jesse E. Atwood,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

Court of Appeals Case No.
20A-CR-2391

Vaidik, J., dissenting.

[17] I respectfully dissent. Section 35-45-6-2(2) applies when a person acquires or maintains "an interest in or control of property or an enterprise" through a pattern of racketeering activity. As the majority notes, the statute used to say "an interest in or control of **real property** or an enterprise," but in 1991 the legislature removed the word "real." The majority, relying on our criminal code's general definition, concludes that "property" under Section 35-45-6-2(2) includes any amount of money obtained in a drug deal. I disagree. For the

reasons that follow, I believe the word "property" under our RICO statute should not be construed to include the small amount of cash that changes hands in a garden-variety drug deal.

[18] For starters, I can't imagine that when our legislature established the crime of "corrupt business influence" it was thinking of a low-level meth dealer making one-gram sales out of his bedroom window at his mom's house. In his opinion reversing the RICO conviction of a Walmart shoplifter in *Robinson*, our late colleague Judge Michael Barnes deftly summed up the absurdity of using the RICO statute in run-of-the-mill cases like these:

> We simply do not believe the commission of two acts of shoplifting of this type is the kind of activity our legislature meant to be covered by our RICO statute. We have previously observed that our RICO statute was designed to address the more sinister forms of corruption and criminal activity. RICO is structured to reach and punish these diabolical operations that are a greater threat to society than random theft. Additionally, we have described the intent behind RICO laws as permitting cumulative punishment and to seek eradication of organized crime by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. RICO laws were designed to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.
>
> Robinson, while no saint, does not fit the definition of someone involved with any kind of organized crime. He is no Lucky Luciano. He is not even an Ashonta Jackson, who organized others in the commission of escalating armed robberies. *See Jackson*, 50 N.E.3d at 777. The RICO statute in its Indiana form

> is a powerful tool that assuredly has its value and utility, and it is a vital arrow in law enforcement's quiver. Here, the State is off-target both legally and practically by attempting to elevate a two-time shoplifter to the status of a Carlo Gambino. We decline, pursuant to *Jackson*'s guidance, to apply RICO here. There are other means of prosecuting and penalizing repeat offenders such as Robinson, such as through habitual offender or enhanced charges for certain offenses, including theft. But not every repeat offender falls under the RICO statute.

Robinson, 56 N.E.3d at 659-60 (cleaned up). By any measure, Atwood is more like a Robinson than a Luciano or Gambino. Or, to put it in meth terms, RICO is meant for people at or near the top of the chain of command, like Walter White in *Breaking Bad*, not a small-scale peddler at the bottom, like Atwood.

[19] Moreover, applying the RICO statute in a case like this is directly contrary to the 2013 legislation that significantly reduced sentences for low-level drug offenses. *See* P.L. 158-2013; *Knutson v. State*, 103 N.E.3d 700, 703 (Ind. Ct. App. 2018) (discussing "the General Assembly's comprehensive revisions to our criminal code, which included reducing penalties for certain drug offenses"); *Marley v. State*, 17 N.E.3d 335, 339 (Ind. Ct. App. 2014) (noting "recent changes to the Indiana criminal code that have, under certain circumstances, notably decreased the sentences for drug offenses"), *trans. denied*. Relevant here, before the 2013 legislation, the base crime of dealing in methamphetamine was a Class B felony, carrying a sentencing range of six to twenty years. *See* Ind. Code § 35-48-4-1.1 (2012); I.C. § 35-50-2-5(a). After the 2013 legislation, the base crime is a Level 5 felony, carrying a sentencing range of one to six years. *See* I.C. § 35-48-4-1.1; I.C. § 35-50-2-6(b). In other words,

the minimum sentence became the maximum sentence. Allowing prosecutors to file a "corrupt business influence" charge, also a Level 5 felony, against people like Atwood offers them a partial end run around this intended reduction. Nearly every drug dealer could be subject to this higher penalty. I don't think this is what the legislature intended.

[20] To harmonize Section 35-45-6-2(2) with the general purpose of RICO statutes and our legislature's recent reduction of sentences for most drug offenses, I would hold that a low-level drug dealer who makes $80 from a sale (or $320 from four sales) has not acquired or maintained "an interest in or control of property or an enterprise." And if this view doesn't prevail in our appellate courts, the General Assembly should strongly consider revisiting the statute. Otherwise, our prisons will begin to fill again with street dealers, many of whom are addicts themselves—the precise situation that prompted the 2013 legislation in the first place.