MEMORANDUM DECISION

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FILED
Dec 11 2023, 9:23 am
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

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IN THE COURT OF APPEALS OF INDIANA

Angela Sue Hawk,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 11, 2023

Court of Appeals Case No. 23A-CR-1553

Appeal from the Shelby Superior Court

The Honorable David N. Riggins, Judge

Trial Court Cause No. 73D02-2210-F6-359

Memorandum Decision by Judge Mathias
Judges Riley and Crone concur.

Mathias, Judge.

[1] Angela Hawk appeals her conviction for Level 6 felony theft following a jury trial. She presents three issues for our review:

> 1. Whether the trial court committed fundamental error when it instructed the jury.
>
> 2. Whether the State presented sufficient evidence to support her conviction.
>
> 3. Whether her sentence is inappropriate in light of the nature of the offense and her character.

[2] We affirm.

Facts and Procedural History

[3] On September 13, 2022, Cherie McCollum reported that her truck had been stolen. On October 5, Shelbyville Police Department ("SPD") officers responded to a report that the truck had been found in a casino parking lot. When Deputy Chief Shawn Bennett and Officer Travis Kempton arrived, they saw a woman sitting in the driver's seat of the parked truck. The woman identified herself as Hawk and said that she was borrowing the truck from McCollum, who was her friend. Officer Kempton called McCollum, who disputed Hawk's claim of permission to borrow the truck.

[4] The State charged Hawk with Level 6 felony theft. A jury found her guilty as charged. The trial court entered judgment accordingly and sentenced Hawk to 500 days in the Department of Correction. This appeal ensued.

Discussion and Decision

Issue One: Fundamental Error

[5] Hawk first contends that the trial court committed fundamental error when it instructed the jury. In particular, Hawk argues that the trial court failed to instruct the jury regarding the definitions of the "knowingly" or "intentionally" elements of theft. Hawk acknowledges that she did not object to the jury instructions at trial and that she must consequently establish fundamental error in order to prevail on her claim of instructional error. *See Clemons v. State*, 83 N.E.3d 104, 107 (Ind. Ct. App. 2017), *trans. denied*.

> Our Supreme Court has described the fundamental error standard as a "daunting" one, applicable only in egregious circumstances. *Knapp v. State*, 9 N.E.3d 1274, 1281 (Ind. 2014). "To qualify as fundamental error, 'an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible' and must 'constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.'" *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007) (quoting *Benson v. State*, 762 N.E.2d 748, 755 (Ind. 2002)). The fundamental error exception is extremely narrow and "reaches only errors that are so blatant that the trial judge should have taken action sua sponte." *Id.*

Id.

[6] To prove that Hawk committed Level 6 felony theft, the State had to prove that she knowingly or intentionally exerted unauthorized control over McCollum's truck with the intent to deprive McCollum of any part of its value or use. Ind.

Code § 35-43-4-2 (2023). The trial court instructed the jury in relevant part as follows:

> Final Instruction #4 The Charges.
>
> In this case, the State of Indiana has charged the Defendant by Information in 1 Criminal Count that reads in pertinent part as follows:
>
> Count 1. Theft A Level 6 Felony
>
> * * *
>
> On or about October 5, 2022, in Shelby County, Indiana, Angela Sue Hawk did knowingly[1] exert unauthorized control over a 2001 Chevrolet S10 . . . belonging to Cherie Lynn McCollum with the intent to deprive the owner of any part of its value or use.
>
> * * *
>
> Final Instruction #5 The Crimes Defined and Elements to be Proven
>
> CRIMES DEFINED
>
> The above offense (omitting formal parts) and relevant definitions are set forth in relevant part by Indiana Statutes as follows:
>
> INDIANA CODE [§]35-43-4-2

[1] The charging information omitted "or intentionally" from the elements of the offense. *See* I.C. § 35-43-4-2.

35-43-4-2. Theft – Receiving stolen property.

(a) 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 A misdemeanor. However, the offense is:

(1) a Level 6 felony if:

* * *

(B) the property is a:

(i) motor vehicle (as defined in IC [§] 9-13-2-105(a));

* * *

ELEMENTS TO BE PROVEN

Count 1- THEFT

To convict the Defendant of Theft under Count I, the State must prove beyond a reasonable doubt each of the following elements:

(1) In Shelby County Indiana,
(2) Angela Hawk
(3) knowingly or intentionally exerted
(4) unauthorized control over a motor vehicle of another person
(5) with intent to deprive the other person of any part of its use or value

If the State fails to prove any of these elements beyond a reasonable doubt you must find the Defendant not guilty of Count 1, Theft, A Level 6 felony.

> If the State proves each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Count 1, Theft, A Level 6 felony.

Appellant's App. Vol. 2, pp. 47-48.

[7] "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." I.C. § 35-41-2-2. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." *Id.* Our Supreme Court has stated that,

> [u]nder our penal code[, "knowingly" and "intentionally"] are terms of art; that is, they have special legal definitions. I.C. § 35-41-2-2. *Smith v. State* (1981), Ind. 422 N.E.2d 1179. The use of a word of art in an instruction requires a further instruction on the definition of that word. *Martin v. State* (1974), 262 Ind. 232, 246, 314 N.E.2d 60, 70. The trial court has a duty to give such instructions defining words of art. *See Martin*, *supra* 314 N.E.2d at 70.

Abercrombie v. State, 478 N.E.2d 1236, 1239 (Ind. 1985).

[8] In *Abercrombie*, the defendant appealed his burglary and theft convictions and argued in relevant part that the trial court erred when it did not sua sponte instruct the jury on the definitions of "knowingly" or "intentionally." *Id.* at 1237-38. The Court held that, while the trial court should have defined those terms for the jury, the instructions given did "inform the jury that guilt must rest upon a knowing or intentional state of mind." *Id.* at 1239. And, without any

"special prejudicial effect of the omission . . . identified" by the defendant, the Court was "not persuaded the error in instructions impinged a substantial right warranting reversal." *Id.*

[9] Here, Hawk alleges a "special prejudicial effect in the omission" of the definitions in that the trial court did not instruct the jury that the State had to prove that Hawk "knowingly exerted *unauthorized* control over the truck." Appellant's Br. at 9 (emphasis original). But Hawk is incorrect. The trial court explicitly instructed the jury that her control over the truck had to be knowingly unauthorized. We cannot say that the trial court committed fundamental error when it did not sua sponte instruct the jury on the definitions of "knowingly" and "intentionally." *See Potter v. State*, 684 N.E.2d 1127, 134-35 (Ind. 1997) (holding insufficient prejudice shown on ineffective assistance of counsel claim for failure to request jury instructions on definitions of "knowingly" and "intentionally").

Issue Two: Sufficiency of the Evidence

[10] Hawk next contends that the State presented insufficient evidence to support her conviction. Our standard of review is well settled.

> When an appeal raises "a sufficiency of evidence challenge, we do not reweigh the evidence or judge the credibility of the witnesses . . . ." We consider only the probative evidence and the reasonable inferences that support the verdict. "We will affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'"

Phipps v. State, 90 N.E.3d 1190, 1195 (Ind. 2018) (quoting *Joslyn v. State*, 942 N.E.2d 809, 811 (Ind. 2011)).

[11] Again, to prove that Hawk committed Level 6 felony theft, the State had to prove that she knowingly or intentionally exerted unauthorized control over McCollum's truck with the intent to deprive McCollum of any part of its value or use. I.C. § 35-43-4-2. Hawk argues that the State failed to prove either that her use of the truck was unauthorized or that she knew it was unauthorized. We disagree.

[12] McCollum testified that, while she had previously allowed Hawk to borrow her truck on several occasions, she had not given Hawk permission to take the truck in August or September of 2022. McCollum testified that she woke up one morning to find her truck missing and reported it stolen. Thereafter, McCollum tried for weeks to contact Hawk by text message and phone calls, to no avail.

[13] Hawk points out that McCollum has issues with her memory, which Hawk alleges undermines the veracity of McCollum's trial testimony. And Hawk cites discrepancies in McCollum's testimony regarding timelines and her son's age, which she misstated by nine years. But McCollum testified, unequivocally, that she remembered that she had not given Hawk permission to borrow her truck at the time of the theft. As our Supreme Court has stated, "[i]t is the jury's responsibility to resolve . . . conflicts" in the evidence. *Lott v. State*, 690 N.E.2d 204, 208 (Ind. 1997). We will not reweigh the evidence or reassess a witness's credibility on appeal.

[14] Hawk also maintains that the evidence shows that she was not aware of a "high probability" that she had taken the truck without McCollum's permission. Appellant's Br. at 12 (citing I.C. § 35-41-2-2(b) ("A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so.")). In support, Hawk cites the evidence that she and McCollum have been friends for many years; McCollum had previously let Hawk borrow the truck on many occasions; Hawk told police that she had permission to use the truck; and Hawk was not trying to hide her possession of the truck. But, again, Hawk's argument amounts to a request that we reweigh the evidence, which we will not do on appeal.

[15] The State presented sufficient evidence that Hawk knowingly or intentionally took McCollum's truck without permission. Thus, the evidence is sufficient to support her Level 6 felony conviction.

Issue Three: Sentence

[16] Finally, Hawk contends that her sentence is inappropriate in light of the nature of the offense and her character. Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[17] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id.* Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[18] The advisory sentence for a Level 6 felony is one year, with the minimum sentence being six months and the maximum sentence being two and one-half years. I.C. § 35-50-2-7. Here, the trial court sentenced Hawk to 500 days in the DOC.

[19] Hawk argues that the nature of the offense does not support her sentence because she alleges that McCollum was not really harmed by the theft of such an old truck when McCollum has a newer car that she drives. And Hawk argues that her character does not support the sentence because she has shown significant progress in her recovery from addiction. We do not agree.

[20] With respect to the nature of the offense, Hawk and McCollum were close friends, and Hawk abused that trust when she stole the truck. With respect to Hawk's character, her gains in recovery from her addiction are, of course, to be

lauded. But we cannot ignore Hawk's significant criminal history, which includes eight felony convictions and fourteen misdemeanor convictions. Moreover, Hawk has been subject to notice of violations of the terms of her probation on three occasions, and she has had home detention and/or work release terminated on three occasions. Hawk's 500-day sentence is not inappropriate.

[21] Affirmed.

Riley, J., and Crone, J., concur.