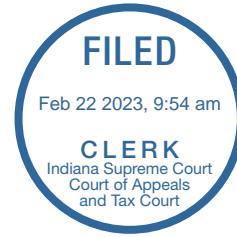


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Alexis Bernaye Toney,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 22, 2023

Court of Appeals Case No.
22A-CR-1698

Appeal from the Clark Circuit
Court

The Honorable N. Lisa Glickfield,
Judge

The Honorable Jeffrey Branstetter,
Magistrate

Trial Court Cause No.
10C03-1807-F6-1252

Memorandum Decision by Judge Bailey
Judges Brown and Weissmann concur.

Bailey, Judge.

Case Summary

- [1] Alexis Bernaye Toney appeals her conviction for Theft, as a Level 6 felony.¹
We affirm.

Issues

- [2] Toney presents two issues for review:
- I. Whether the trial court abused its discretion by admitting into evidence surveillance videotapes generated at an Amazon facility; and
 - II. Whether the State presented sufficient evidence that the value of stolen property was at least \$750.00, to support the elevation of the offense of Theft from a Class A misdemeanor to a Level 6 felony.

Facts and Procedural History

- [3] In July of 2018, Toney was employed by a company that provided cleaning services at an Amazon fulfillment center in Jeffersonville. Toney's duties included picking up trash but did not include handling any merchandise being offered for sale. On July 8, 2018, as Toney pushed a cleaning cart through an

¹ Ind. Code § 35-43-4-2(a).

exit turn-style, theft detector alarms were activated. Security personnel investigated and removed from Toney's cleaning cart a yellow garbage bag full of clothing and food items. Loss prevention manager Mark Sarver and loss prevention specialist Brian McDaniel removed the trash bag contents and compared each of the clothing items with its assigned manufacturer's suggested retail price ("MSRP"). The clothing items had a total MSRP value of \$3,316.20.

- [4] On July 16, 2018, the State of Indiana charged Toney with Theft, as a Level 6 felony. On May 26, 2022, a jury trial commenced. At the conclusion of the trial, Toney was found guilty as charged. On June 27, she was sentenced to 360 days of imprisonment, with 310 days suspended. Toney now appeals.

Discussion and Decision

Admission of Surveillance Videotape

- [5] At trial, Sarver testified that the Amazon facility in Jeffersonville had numerous surveillance cameras that operated on a continuing basis recording activities taking place within the premises. The State proffered Amazon recordings from July 7 and July 8, 2018, to show Toney's attire and activities on those dates. The trial court admitted into evidence only those exhibits which included a date and time stamp. Toney now contends that the trial court abused its discretion in admitting a portion of the surveillance footage because the State failed to establish an adequate foundation for admission as substantive evidence under the silent witness theory.

- [6] A trial court has broad discretion to rule on the admissibility of evidence. *Bradley v. State*, 54 N.E.3d 996, 999 (Ind. 2016). We review rulings on the admissibility of evidence “for abuse of that discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances and the error affects a party’s substantial rights.” *Guilmette v. State*, 14 N.E.3d 38, 40 (Ind. 2014).
- [7] The “silent witness” theory, as first adopted by this Court, permits the admission of photographs as substantive evidence, rather than merely as demonstrative evidence, so long as the photographic evidence is also relevant. *Bergner v. State*, 397 N.E.2d 1012, 1014-15 (Ind. Ct. App. 1979). The *Bergner* Court required a “strong showing of the photograph’s competency and authenticity.” *Id.* at 1017. Where images were taken by automatic devices, “there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera.” *Id.*
- [8] The “silent witness” theory has been extended to the use of video recordings. *Mays v. State*, 907 N.E.2d 128, 131 (Ind. Ct. App. 2009), *trans. denied*. In order to authenticate videos under the “silent-witness theory,” there must be evidence describing the process or system that produced the videos and showing that the video is an accurate representation of the events in question. *See* Ind. Evidence Rule 901(b)(9). The proponent must show that the video was not altered in any

significant respect, and the date the video was taken must be established when relevant. *McFall v. State*, 71 N.E.3d 383, 388 (Ind. Ct. App. 2017).

That is,

“[T]here must be a strong showing of authenticity and competency” and ... when automatic cameras are involved, “there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and changing of custody of the film after its removal from the camera.”

[9] *McHenry v. State*, 820 N.E.2d 124, 128 (Ind. 2005) (citing *Edwards v. State*, 762 N.E.2d 128, 136 (Ind.Ct.App.2002)). This standard is applied “where there is no one who can testify as to [the recording’s] accuracy and authenticity because the [recording] must ‘speak for itself’ and because such a ‘silent witness’ cannot be cross-examined.” *Edwards*, 762 N.E.2d at 136. The witness must provide testimony identifying the scene that appears in the image “sufficient to persuade the trial court ... of their competency and authenticity to a relative certainty.” *Knapp v. State*, 9 N.E.3d 1274, 1282 (Ind. 2014) (citations and quotations omitted).

[10] Sarver testified that the Amazon surveillance system was constantly recording footage stored on “solid state drives” secured in “a main data frame room.” (Tr. Vol. II, pgs. 93-94.) According to Sarver, the footage could not be tampered with and was not subject to alteration or edit. He had conducted training of subordinates regarding the surveillance system. As to the particular exhibits admitted into evidence, Sarver stated that he had reviewed the footage

immediately after the incident and one day prior to his court appearance, detecting no changes. He explained his familiarity with the premises under surveillance and described the security processes depicted in the video. An adequate foundation supported admission of the video footage. Toney observes that McDaniel rather than Sarver downloaded video imagery to a thumb drive and appears to suggest that the State was required to establish a more detailed chain of custody for the thumb drive. However, Toney stops short of arguing that there was a gap in the chain of custody. Toney has demonstrated no abuse of the trial court's discretion in the admission of evidence.

Sufficiency of the Evidence

- [11] In reviewing a challenge to the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witnesses. *McHenry*, 820 N.E.2d at 126. “It is the fact-finder’s role, not that of appellate courts[,], to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction.” *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007).
- [12] To convict Toney of Theft, as charged, the State was required to establish beyond a reasonable doubt that Toney knowingly or intentionally exerted unauthorized control over property of Amazon, with intent to deprive Amazon of any part of its value or use. Ind. Code § 35-43-4-2. To support elevation of the offense from a Class A misdemeanor to a Level 6 felony, the State was required to establish that “the value of the property is at least seven hundred fifty dollars (\$750) and less than fifty thousand dollars (\$50,000).” *Id.*

[13] For purposes of the Theft statute, “the value of property” means:

(1) the fair market value of the property at the time and place the offense was committed; or

(2) if the fair market value of the property cannot be satisfactorily determined, the cost to replace the property within a reasonable time after the offense was committed.

I.C. § 35-43-4-2(b). Subsection (c) provides: “A price tag or price marking on property displayed or offered for sale constitutes prima facie evidence of the value of the property.”

[14] Toney contends that the MSRP evidence does not constitute evidence of fair market value because some buyers could be expected to pay less. She argues that the fair market value of the items “would have been the prices listed on the Amazon website,” which the State did not utilize. Appellant’s Brief at 10.

[15] In *Sullivan v. State*, 77 N.E.3d 187 (Ind. App. 2017), a panel of this Court was asked to consider whether a quoted black market value of pills could be used to establish the property’s fair market value.

This Court has explained that “[t]he fair market value is ‘the price at which property would change hands between a willing buyer and seller, neither being under any compulsion to consummate the sale.’” *Pitcavage v. Pitcavage*, 11 N.E.3d 547, 564 (Ind. Ct. App. 2014) (quoting *City of Carmel v. Leeper Elec. Servs., Inc.*, 805 N.E.2d 389, 395 (Ind. Ct. App. 2004)). In this case, the State presented evidence that willing buyers paid \$5 per pill. We see no reason to question this evidence simply because it is

evidence of the black market value. Therefore, we find the evidence sufficient to support Sullivan’s theft conviction.

Id. at 191-92. As such, the evidence of fair market value was sufficient where some willing buyers paid a particular price. There was no requirement that it be a uniform price for all buyers. *See id.*

[16] Here, Sarver testified that he and McDaniel took each item from the garbage bag and matched its unique assigned number to the pricing structure maintained on a manifest. According to Sarver, the price was constant unless a vendor notified Amazon of a price change or a sale was initiated, in which case the price on the manifest would be changed. A fact-finder could reasonably determine that at least some customers willingly made purchases at the identified MSRP level. Moreover, Sarver testified that he and McDaniel “priced out” the clothing as having a value of \$3,316.20, which is well in excess of the offense elevation threshold of Indiana Code Section 35-43-4-2. Sufficient evidence of value supports the elevation of Toney’s offense to a Level 6 felony.

Conclusion

[17] Toney did not demonstrate an abuse of the trial court’s discretion in the admission of evidence. Sufficient evidence supports the elevation of the offense of Theft to a Level 6 felony.

[18] Affirmed.

Brown, J., and Weissmann, J., concur.