MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Harve Hensley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2023

Court of Appeals Case No.
22A-CR-2056

Appeal from the
Jefferson Superior Court

The Honorable
Richard G. Striegel, Senior Judge

Trial Court Cause No.
39D01-2202-F6-134

Memorandum Decision by Senior Judge Robb.
Judges Vaidik and Mathias concur.

Robb, Senior Judge.

Statement of the Case

[1] Harve Hensley executed a contract to rent land he neither owned nor controlled, taking $9,000 from the purported lessee. He appeals his conviction by jury of Level 6 felony theft and the sentence imposed by the trial court, arguing: (1) the trial court erred in denying his request for a special prosecutor; (2) the State failed to provide sufficient evidence to sustain the conviction; and (3) the Court should revise his sentence. Concluding Hensley has not shown reversible error and has not established grounds for sentence revision, we affirm.

Facts and Procedural History

[2] Bronson Hensley, Sr., created the Bronson Hensley Revocable Living Trust ("the Trust") and transferred his assets to the Trust, including land used for farming ("the farmland"). He died in 2017. Later, his children, including Hensley and Bronson Hensley, Jr. ("Bronson"), disagreed as to who was the Trust's authorized trustee. Litigation ensued, and in June 2019, a trial court determined Bronson was the only valid trustee.

[3] In October 2019, Gabriel Hubbard (then known as Gabriel Nay) purchased the farmland from the Trust, via Bronson as trustee. Bronson had previously received permission from the Jefferson Circuit Court to sell the farmland.

[4] In February 2021, Hensley filed another lawsuit against his siblings, claiming he was the Trust's only rightful trustee. In March 2021, Hensley approached Jeff Lytle, offering to lease the farmland to him on behalf of the Trust. Hensley said he was the sole trustee, and he displayed supporting paperwork that looked "legal" and "professional" to Lytle. Tr. Vol. 2, p. 88. Lytle paid Hensley $9,000 after they executed a lease. Lytle is experienced in renting land for farming. He usually pays rent after the harvest rather than up front, but Hensley insisted on an immediate payment.

[5] Lytle later learned Hubbard owned the farmland. Lytle asked Hensley to return his money, but Hensley refused, saying he had spent it. Hensley also acknowledged the Trust was the subject of ongoing litigation. On February 22, 2022, the trial court in Hensley's February 2021 lawsuit determined Hensley's claim was barred by the doctrine of res judicata.

[6] The State charged Hensley with Level 6 felony theft and Level 6 felony fraud. Hensley moved for the appointment of a special prosecutor, alleging the prosecutor had a conflict of interest. The trial court denied his motion after a hearing, concluding there was no "actual conflict of interest." *Id.* at 20.

[7] Before trial, the State dismissed the fraud charge, and a jury then found Hensley guilty of theft. The trial court sentenced Hensley to serve two years and ordered him to repay Lytle. This appeal followed.

Issues

[8] Hensley presents three issues, which we restate as:

I. Did the trial court err in denying Hensley's request for a special prosecutor?

II. Is there sufficient evidence to sustain Hensley's conviction?

III. Is Hensley's two-year sentence inappropriate?

Discussion and Decision

I. Special Prosecutor

[9] Hensley claims the trial court should have appointed a special prosecutor because the prosecutor had been involved in Hensley's disputes with his siblings over the Trust. We review the denial of a petition for a special prosecutor for an abuse of discretion. *Swallow v. State*, 19 N.E.3d 396, 399 (Ind. Ct. App. 2014), *trans. denied*. "An abuse of discretion is an erroneous conclusion and judgment, one clearly against the logic and facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." *D.R.C. v. State*, 957 N.E.2d 205, 209 (Ind. Ct. App. 2011) (quotation omitted), *trans. denied*.

[10] A trial judge may appoint a special prosecutor if:

> (A) a person files a verified petition requesting the appointment of a special prosecutor; and
>
> (B) the court, after:
>
> (i) notice is given to the prosecuting attorney; and
>
> (ii) an evidentiary hearing is conducted at which the prosecuting attorney is given an opportunity to be heard;

> finds by clear and convincing evidence that the appointment is necessary to avoid an actual conflict of interest or there is probable cause to believe that the prosecuting attorney has committed a crime . . . .

Ind. Code § 33-39-10-2(b)(2) (2014).

[11] "The purpose of the special-prosecutor statute is to protect the State's interest in preserving the public confidence in the criminal-justice system and ensuring that the prosecutor serves the ends of justice." *State v. Herrmann*, 151 N.E.3d 1256, 1258 (Ind. Ct. App. 2020), *trans. denied*. The statute "incorporates a recognition of the grave nature of disqualification and the goal of comprehensively restraining disqualifications to situations of real need." *State ex rel. Long v. Warrick Cir. Ct.*, 591 N.E.2d 559, 560 (Ind. 1992) (discussing a predecessor of the current statute).

[12] Under Indiana Code section 33-39-10-2(b)(2), a prosecutor must be disqualified if the controversy involved in the pending case is substantially related to a matter in which the lawyer previously represented another client. *Swallow*, 19 N.E.3d at 399 . The Indiana Supreme Court has also "disapproved of lawyers prosecuting a criminal case if, by reason of prior representation, the lawyer may have 'acquired a knowledge of facts *upon which the prosecution is predicated or which are closely interwoven therewith.*'" *Johnson v. State*, 675 N.E.2d 678, 682 (Ind. 1996) (quoting *State v. Tippecanoe Cnty. Court*, 432 N.E.2d 1377, 1378 (Ind. 1982) (emphasis added)). "The public trust in the integrity of the judicial process requires that any serious doubt be resolved in favor of disqualification." *Williams v. State*, 631 N.E.2d 485, 487 (Ind. 1994).

[13] David Sutter was the prosecutor in Hensley's case. In 2017, Sutter closed his private practice because he was joining the prosecutor's office. Before Sutter closed his office, Bronson met with him, bringing documents related to the Trust. Bronson asked Sutter to represent him in a dispute with Hensley over their father's estate. Sutter declined and he referred Bronson to another attorney. Sutter later stated he did not recall doing any work for the Trust or reading any of Bronson's documents.

[14] Hensley points to a September 2017 email from his former attorney stating she would request Trust documents from Sutter, but the email (which was not entered into the record directly but was instead read into the record by the trial court) lacks any explanation for why Hensley's attorney believed Sutter had such documents or whether Sutter did possess them. Under these circumstances, Hensley failed to prove by clear and convincing evidence that Sutter represented Bronson in the Trust dispute or acquired from Bronson a knowledge of facts on which the theft prosecution was predicated. *See Swallow*, 19 N.E.3d at 400 (trial court did not err in denying motion to replace prosecutor with special prosecutor; defendant failed to show prosecutor had gained any confidential information about defendant). The trial court did not abuse its discretion in denying Hensley's motion.

II. Sufficiency of the Evidence

[15] Hensley next argues his theft conviction must be reversed because the State failed to prove he had the required mental culpability to commit the offense. When we review the sufficiency of the evidence to support a conviction, we

consider only the probative evidence and reasonable inferences supporting the verdict. *Girdler v. State*, 932 N.E.2d 769, 771 (Ind. Ct. App. 2010). We will affirm "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id*.

[16] To obtain a conviction of Level 6 felony theft as charged, the State was required to prove beyond a reasonable doubt that Hensley: (1) knowingly or intentionally (2) exerted unauthorized control (3) over $9,000 belonging to Jeff Lytle (4) with the intent of depriving Lytle of the property's value or use. Ind. Code § 35-43-4-2(a) (2021); Appellant's App. Vol. 2, p. 66.

[17] "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." Ind. Code § 35-41-2-2(b) (1977). "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a). Knowledge is a mental state, and "the trier of fact must resort to reasonable inferences of its existence." *Young v. State*, 761 N.E.2d 387, 389 (Ind. 2002). As a result, when a defendant's intent or knowledge is at issue, we must consider the surrounding circumstances of a case to determine whether the guilty verdict was proper. *Villagrana v. State*, 954 N.E.2d 466, 468 (Ind. Ct. App. 2011).

[18] Hensley claims he believed in good faith that he was the sole valid trustee of his father's trust, and he thought he had the authority to lease the farmland to Lytle. Thus, he concludes he could not have intentionally or knowingly stolen $9,000 from Lytle. Based on the evidence most favorable to the judgment, we

disagree. Hensley had engaged in extensive litigation with his siblings about the Trust and the farmland by the time he approached Lytle in 2021. In 2019, a court had determined Bronson, not Hensley, was the authorized trustee of the Trust. In addition, Bronson had requested and received permission from the trial court to sell the farmland, and Hensley did not deny he was aware of Bronson's 2019 sale of the land to Hubbard during his 2021 negotiations with Lytle.

[19] Even though Hensley knew of the court rulings determining he had no interest in the farmland, he told Lytle that he was the sole trustee of the Trust, going so far as to present paperwork supporting his claim of authority to rent the land. Unlike Bronson, Hensley did not seek court approval for the lease transaction. And after Lytle demanded his money back, Hensley refused, saying he had spent it. Hensley also admitted to Lytle the Trust was in litigation.

[20] Under these circumstances, the jury could determine beyond a reasonable doubt that Hensley knowingly or intentionally exerted unauthorized control over Lytle's $9,000 by an improper and ineffective lease. Hensley's argument that he believed he was the only valid trustee amounts to a request to reweigh the evidence, which we cannot do. *See, e.g., Lawson v. State*, 199 N.E.3d 829, 837 (Ind. Ct. App. 2022) (affirming conviction of false informing; defendant denied he knew he had provided false information in his affidavit, but other evidence proved his knowledge, and his citation to his denials amounted to request to reweigh evidence), *trans. denied*.

III. Appropriateness of Sentence

[21] Hensley argues his two-year sentence is unjustified and asks the Court to reduce it by an unspecified amount. Article 7, section 6 of the Indiana Constitution authorizes the Court to review and revise sentences. Indiana Appellate Rule 7(B) implements this authority, stating we may revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

[22] "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). As a result, the main role of sentencing review under Appellate Rule 7(B) is to "leaven the outliers." *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018). Whether a sentence is inappropriate "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*, 895 N.E.2d at 1224. Accordingly, "we may look to any factors appearing in the record" in our review. *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). "A defendant must persuade the appellate court that his or her sentence" is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[23] At the time Hensley committed his offense, the maximum sentence for Level 6 felony theft was two and one-half years, with a minimum sentence of six

months and an advisory sentence of one year. Ind. Code § 35-50-2-7(b) (2019). The trial court sentenced Hensley to two years, which is above the advisory but short of the maximum possible sentence.

[24] "The nature of the offenses is found in the details and circumstances of the commission of the offenses and the defendant's participation." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Hensley took $9,000 from Lytle as rent for property Hensley did not own or control. The amount Hensley stole was well above the minimum necessary for the theft to qualify as a Level 6 felony. *See* Ind. Code §35-43-4-2(a)(1)(A) (value of property stolen must be at least $750). Hensley insisted Lytle pay him the rent up front, when Lytle was used to paying rent only after the harvest. Further, when Lytle discovered someone else owned the land and demanded a refund, Hensley refused, asserting he had spent the money. He also finally admitted he was in litigation about the Trust.

[25] We turn to the second element of the Rule 7(B) analysis, the character of the offender. "The character of the offender is found in what we learn of the offender's life and conduct." *Croy*, 953 N.E.2d at 664. Hensley was forty-three years old at sentencing. He has not accrued any criminal convictions since 2008, but his criminal record before that date includes several convictions for operating a vehicle while intoxicated, including one as a Class D felony. Hensley argues his prior offenses are too remote in time and occurred before he quit drinking. "The chronological remoteness of a defendant's prior criminal history should be taken into account." *Buchanan v. State*, 767 N.E.2d 967, 972

(Ind. 2002). "However, "we will not say that remoteness in time, to whatever degree, renders a prior conviction irrelevant.'" *Id.* (quoting *Harris v. State*, 272 Ind. 210, 215, 396 N.E.2d 674, 677 (1979)). Hensley's failure to lead a law-abiding life is a valid sentencing consideration. Further, his underhanded dealings with Lytle do not reflect well on his character.

[26] Under these circumstances, Hensley has failed to persuade us his aggravated sentence, which falls short of the maximum, is an outlier in need of correction.

Conclusion

[27] For the reasons stated above, we affirm the judgment of the trial court.

[28] Affirmed.

Vaidik, J., and Mathias, J., concur.