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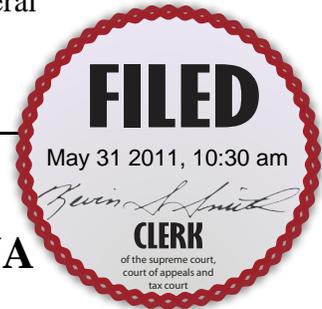
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**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN L. CURRY,)

Appellant-Defendant,)

vs.)

No. 20A03-1008-CR-454)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Steven R. Bowers, Judge
Cause No. 20D02-0907-FC-96

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Kevin L. Curry created, forged, and cashed checks by using other individuals to present the checks for cashing as purported payroll checks. In each instance, after cash was obtained, Curry split the sum with the presenter of each false check. Eventually, he was arrested and charged with one count of class C felony corrupt business influence and fifteen counts of class C felony forgery. The State later added a habitual offender count. After a jury convicted Curry on all seventeen counts, the trial court sentenced him to forty-four years in prison.

Curry now appeals his convictions, alleging insufficiency of evidence and claiming that the trial court erred in allowing the State to amend the charging information to add the habitual offender count. He also challenges the appropriateness of his sentence. We remand for clarification of his sentence and affirm in all other respects.

Facts and Procedural History

On November 1, 2008, Curry went to Martin's Supermarket ("Martin's") and attempted to cash a check. However, because he had previously cashed a counterfeit check there, an alert had been placed on his name, and the clerk refused to cash the current check. Instead, she notified her manager. Curry explained to the manager that he had received both checks as donations to his boxing club. The manager notified police, and Curry subsequently entered into a repayment arrangement with Martin's.

On November 19, 2008, Curry approached longtime friend Kim Kie and asked her to cash some counterfeit payroll checks that he had made. Kie was a drug user at the time.

Curry drove her to Martin's and gave her a purported payroll check and a business card from J.R. Cleaning Service ("J.R.'s"). Kie successfully cashed the false check, and the two split the money. The next day, they successfully repeated the process at a different Martin's location, again with a purported payroll check made out to Kie by J.R.'s.

Thereafter, Curry made a counterfeit payroll check from Ancon Construction Company, payable to Kie. Kie gave the check to an elderly disabled woman named Martha George to hold, in exchange for which Martha withdrew money from her savings account and gave it to Kie. That same week, Curry and Kie repeated the process with a check purportedly from Ameritrans Bus Service ("Ameritrans"), and Martha again gave Kie cash from her bank account. Curry then made a payroll check purportedly from Fred's Towing Service ("Fred's Towing"), payable to Kie. Kie cashed it at a local gas station. Each time Kie obtained cash, she and Curry divided it.

Later, Curry and Kie gave Joeleanna Taylor a false check from Fred's Towing. Kie drove Taylor to the same gas station, but when Taylor attempted to cash the check, it was refused. Kie then took her to a Marathon station, where the check was accepted for cash. Taylor cashed three counterfeit checks for Kie and Curry at Martin's. Kie gave Curry the cash, and he took half and gave the remainder to Kie and Taylor to divide.

Avengela Jones cashed four counterfeit checks from Curry, purportedly issued as payroll checks from either Peddler's Village Auction or Mike's Towing Service. Each time, Curry would drive her to either a Martin's or a Marathon station, and after she returned with the cash, the two would divide it. Jones was a drug user at the time.

In December 2008, Curry approached another old friend, Carla Thomas, to see if she was interested in making some extra cash. Twice, he drove her to Martin's stores, where she cashed checks purportedly from Ameritrans, and the two split the money. Thomas testified that she had seen Curry make the checks on his computer. Tr. at 299-300, 304.

That same December, Michael Jackson was at a local gas station when a man fitting Curry's description approached him about a "quick money" deal. Jackson was unemployed and expecting a baby. He did not know the man who approached him but recognized him as someone from the neighborhood. The man gave Jackson a false payroll check from Honker's Expert Catering and drove him to Martin's. When Martin's refused the check, Jackson left and went home.

Elkhart Police Detective Susan Lambright began an investigation in late 2008 and early 2009 and discovered a pattern regarding the counterfeit checks. For example, they bore the same fonts, watermarks, and routing numbers and were purportedly from the same handful of local companies, contained the same misspellings, and were made with the same kind and colors of paper. When Detective Lambright questioned the purported payees listed on the checks, three of them said that Curry had provided the checks to be cashed, and the other two provided a description that fit Curry's physical traits. At Curry's home, police found a green sedan matching the descriptions provided by all five payees.

On July 1, 2009, the State charged Curry with one count of class C felony corrupt business influence and fifteen counts of class C felony forgery. The omnibus date was September 21, 2009. On January 27, 2010, the State filed an amended information, adding a

habitual offender count. On June 24, 2010, a jury found Curry guilty on Counts I through XVI and subsequently found him guilty on the habitual offender count. Curry now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Denial of Directed Verdict

Curry first asserts that the trial court erred in denying his motion for a directed verdict on Counts I and XIII. “In order for a trial court to grant a directed verdict, there must be a complete lack of evidence on a material element of the crime or the evidence must be without conflict and susceptible to only an inference in favor of the defendant’s innocence.” *Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). However, if the evidence is sufficient to support a conviction on appeal, then the trial court’s denial of a motion for directed verdict cannot be in error. *Id.* Consequently, we review the trial court’s denial of a motion for directed verdict using essentially the same standard as for a challenge to the sufficiency of evidence. *Edwards v. State*, 862 N.E.2d 1254, 1262 (Ind. Ct. App. 2007), *trans. denied*. We neither reweigh evidence nor judge witness credibility. *Id.* Rather, we consider only the evidence and reasonable inferences supporting the verdict and will affirm if there exists substantial evidence of probative value from which a reasonable trier of fact could have determined that the defendant was guilty beyond a reasonable doubt. *Id.*

A. Count I

Curry asserts that the trial court erred in denying his motion for a directed verdict on Count I, corrupt business influence. “A person ... 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 ... commits corrupt business practice, a Class C felony.” Ind. Code § 35-45-6-2(2). To engage in “racketeering activity” means “to commit, to attempt to commit, to conspire to commit a violation of, or aiding and abetting in ... [f]orgery.” Ind. Code § 35-45-6-1(e)(16). A “pattern of racketeering activity” occurs by “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.” Ind. Code § 35-45-6-1(d). Here, the State asserted that Curry knowingly engaged in a pattern of racketeering activity, by creating and forging counterfeit checks and using individuals to cash them “to acquire or maintain, an interest in or control of property or an enterprise ... U.S. Currency.” Appellant’s App. at 130.

Curry asserts that there is a complete lack of evidence to show that he acquired or maintained an interest in property or an enterprise. Indiana Code Section 35-45-6-1(c) defines “enterprise” to include “a sole proprietorship ... corporation ... partnership ... or ... an association, or a group, whether a legal entity or merely associated in fact.” Curry seems to argue that because he was not involved in a formal business either alone or with others, he cannot be guilty under this statute. We disagree. First, we note that Indiana Code Section 35-45-6-2(2) is written in the disjunctive: “interest in or control of property *or* an enterprise.” (Emphasis added.) Moreover, Indiana Code Section 35-45-6-1(c) specifically includes a “sole proprietorship” within its definition of an “enterprise.” Also, under this

subsection, it is not imperative that other participants be partners or co-owners in the formal sense of a business, but rather, they may be “merely associated in fact.” *Id.*

In *Waldon v. State*, 829 N.E.2d 168, 177 (Ind. Ct. App. 2005), *trans. denied*, we held that the evidence was sufficient to support a finding that the defendant was engaged in an enterprise where the defendant used juvenile accomplices to burglarize local businesses and where the episodes of criminal conduct constituted parts of a single plan with the motive of stealing money. There, Waldon used the children to help him scope out possible targets and then break into the buildings. He shared some of the cash with the children, but kept “the lion’s share” for himself. *Id.* The fact that there was no formal entity or equal distribution of benefits did not prevent this Court from upholding the trial court’s finding of an enterprise.

Here, Curry created counterfeit payroll checks, and he made this fact known to Jones. Although he initially cashed the checks himself, it soon became apparent that to avoid detection, he would need to use others to present the checks for cash. He chose the associates himself or with the help of Kim Kie, and the associates understood that they were cashing purported payroll checks from businesses where they were not employed. To further avoid detection, he utilized different associates and defrauded three different victims.¹ Throughout the three-month spree, the pattern was predictable: Curry would provide the check to the associate, drive the associate to the establishment in his vehicle (or have Kie drive the associate while he waited elsewhere in the parking lot), wait for the associate to

¹ We note, however, that Curry committed four of the fraudulent presentments with Jones and five with Kie.

return with the cash, and then divide the cash 50/50. The evidence is sufficient to support Curry's conviction for corrupt business influence. As such, we find no error in the trial court's denial of his motion for a directed verdict.

B. Count XIII

Curry also challenges the trial court's denial of his motion for a directed verdict on Count XIII, forgery. As stated, on review, we neither reweigh evidence nor judge witness credibility. *Edwards*, 862 N.E.2d at 1262. "A person who, with intent to defraud, makes, utters, or possesses a written instrument in such a manner that it purports to have been made . . . by another person . . . commits forgery, a Class C felony." Ind. Code § 35-43-5-2(b)(1). Here, the State asserted that Curry and Jackson, acting with intent to defraud Martin's, uttered a check purportedly made by Honker's Expert Catering. Appellant's App. at 132.

Curry essentially argues that the State failed to prove that he was the person who gave Jackson the purported payroll check to cash. The identity of the defendant may be shown by circumstantial evidence. *Joyner v. State*, 736 N.E.2d 232, 245 (Ind. 2000). Here, ample circumstantial evidence exists to support a reasonable inference that Curry was the man who gave Jackson the counterfeit check to cash. First, although Jackson could not say for sure that Curry was the man who gave him the check, his physical description of the man was sufficiently similar to Curry's physical characteristics. Moreover, Jackson's description of the crime matched Curry's modus operandi. For example, Jackson said that the man drove him to Martin's in a blue or green sedan to cash a check, and the check matched the other forged checks in size, coloring, and font. This evidence was within the jury's province to

weigh, and we decline Curry's invitation to reweigh it on appeal. The evidence is sufficient to support Curry's conviction on Count XIII. Thus, we find no error in the trial court's denial of his motion for a directed verdict.

II. Sufficiency of Evidence: Count XV

Curry also challenges the sufficiency of evidence to support his conviction on Count XV, forgery. In the information, the State alleged that Curry and Taylor, acting with intent to defraud Marathon, uttered a check purportedly made by Fred's Towing Service. Appellant's App. at 133. Curry again bases his sufficiency challenge on the State's alleged failure to establish his identity as the one who made, uttered, or possessed the false check. Ind. Code § 35-43-5-2(b)(1). We reiterate that a defendant's identity may be established by circumstantial evidence. *Joyner*, 736 N.E.2d at 245.

Count XV involved a slight variation in Curry's pattern in that he gave the false check to Kie, who then gave it to Taylor to cash. Taylor testified that Kie approached her about cashing a forged check and then drove her to the Marathon station to cash it. Tr. at 323-30. She also testified that Kie had an associate who drove to the station and waited in a green sedan. *Id.* The check was purportedly made by Fred's Towing Service, a company that Curry had used before, and was presented to one of Curry's repeated victims, the Marathon station. Moreover, Kie had participated in the check-cashing scheme before, Taylor's description of the vehicle matched Curry's vehicle, and Curry's act of driving to the site of the transaction matched his modus operandi. Thus, the circumstantial evidence supports a reasonable inference that Curry was Kie's associate in the green sedan. We decline Curry's

invitation to reweigh evidence and affirm his conviction on Count XV.

III. Sufficiency of Evidence: Counts IV, V, VI, and XVI

Curry next challenges the sufficiency of evidence to support his convictions on Counts IV, V, VI, and XVI based on what he alleges to be the “incredibly dubious” testimony of Avengela Jones. “Under the incredible dubiousity rule, a court will impinge upon the jury’s responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity.” *Whatley v. State*, 908 N.E.2d 276, 282 (Ind. Ct. App. 2009) (citation and quotation marks omitted), *trans. denied*. This rule is rarely applied; instead, it is limited to cases where a single witness presents inherently contradictory testimony that is equivocal or coerced, and there is a complete lack of circumstantial evidence of guilt. *Id.* “The standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.” *Id.* at 282-83.

Here, Jones’s testimony was straightforward and internally consistent: that Curry gave her a counterfeit payroll check that included her name and information; drove her to either a Martin’s store or the Marathon station on Franklin Road in his green sedan; instructed her to cash the check; and waited in the parking lot for her to return, whereupon the two would split the cash 50/50. She further testified that Curry had told her that he knew how to forge checks and that in each instance, her understanding was that Curry had made the check he handed to her for cashing. She testified that “the idea [was] for it to appear to be a payroll check” and that she had not been employed by the purported employers. Tr. at

270. To the extent Curry predicates his incredible dubiousity claim on Jones's testimony that she was a cocaine user and likely had used cocaine on the days that she presented the counterfeit checks for payment, this is merely an invitation to reweigh evidence and judge witness credibility, which we may not do. We do not find Jones's testimony to be incredibly dubious because it was not inherently contradictory, equivocal, or coerced. Rather, the evidence and reasonable inferences most favorable to the verdicts are sufficient to support Curry's forgery convictions on Counts IV, V, VI, and XVI.

IV. Amendment of Charging Information

Curry next contends that the trial court erroneously permitted the State to belatedly amend the charging information to include a habitual offender count. We apply an abuse of discretion standard when reviewing the trial court's decision to allow such an amendment. *Jackson v. State*, 938 N.E.2d 29, 38 (Ind. Ct. App. 2010). Indiana Code Section 35-34-1-5(e) states,

An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 ... must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

The purpose of this statute is to allow a defendant sufficient time to prepare a defense for the habitual offender charge. *Land v. State*, 802 N.E.2d 45, 53 (Ind. Ct. App. 2004), *trans. denied*. As such, a defendant who challenges as untimely the State's filing of a habitual offender count must demonstrate that he was prejudiced by it. *Id.*

Here, the omnibus date was September 21, 2009. The State filed the habitual offender

count on January 27, 2009, citing as previous felony convictions Curry's 2007 forgery conviction and his 1990 Texas conviction for aggravated kidnapping. On February 8, 2009, the trial court held a hearing at which Curry, acting pro se, entered a plea of not guilty. Shortly thereafter, Curry retained counsel. Neither he nor his counsel objected to the filing of the habitual offender charge. On February 19, 2010, he sought and received a continuance. However, the record is unclear regarding the basis for his request for a continuance. Once a trial court permits a tardy habitual offender filing, a defendant must move for a continuance in order to preserve the error for appeal. *Boggs v. State*, 928 N.E.2d 855, 868 (Ind. Ct. App. 2010), *trans. denied*.

Curry had six months to investigate and prepare a defense to the habitual offender count before the commencement of his June 2010 trial. During the habitual offender phase of the trial, the defense presented argument as to the sufficiency of the evidence to establish his status as a habitual offender. Based on the foregoing, we conclude that Curry failed to establish that the amendment prejudiced him in the preparation and presentation of his defense.

V. Appropriateness of Sentence

Finally, Curry challenges the appropriateness of his sentence pursuant to Indiana Appellate Rule 7(B), which provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” When a defendant requests appellate review and revision of his sentence, we have the power to

affirm, reduce, or increase the sentence. *Akard v. State*, 937 N.E.2d 811, 813 (Ind. 2010). In conducting our review, we focus on the aggregate sentence rather than on the number of counts, the length of sentence on any individual count, or whether the sentence runs concurrently or consecutively. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). We do not look to see whether the defendant’s sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is “inappropriate.” *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). A defendant bears the burden of persuading this Court that his sentence meets the inappropriateness standard. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218; *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

In considering the nature of a defendant’s offense, “the advisory sentence is the starting point the Legislature has selected as an appropriate sentence.” *Anglemyer*, 868 N.E.2d at 494. Curry was convicted of sixteen class C felony counts, each of which carries a sentencing range of two to eight years, with an advisory four-year term. Ind. Code § 35-50-2-6(a). He also was found to be a habitual offender, subject to an additional sentence of up to three times the four-year advisory sentence for the underlying class C felony. Ind. Code § 35-50-2-8(h). The trial court imposed an eight-year sentence on Count I, corrupt business influence; for Counts II through VIII, the court imposed eight years each, all to run concurrent to each other but consecutive to Count I; for Counts IX through XII, the court also imposed eight-year terms, concurrent to each other but consecutive to Count I; for Count XIII, the court imposed a concurrent eight-year sentence; for Counts XIII through XVI, the

court imposed eight-year terms, all to run concurrent to each other but consecutive to Counts IX through XII; and for Count XVII, the habitual offender enhancement, the court imposed a twelve-year term, to run consecutive to other counts. We note, and the State concedes, that a habitual offender count must be attached to an underlying felony and cannot be imposed as a separate consecutive sentence. *Hazzard v. State*, 642 N.E.2d 1368, 1371 (Ind. 1994). Thus, the trial court must attach the habitual offender count to one of the underlying felony counts. Moreover, we note that the aggregate term is forty-four years, but the trial court's sentencing order specifically states a "total sentence of 43 years." Appellant's App. at 27. Thus, an obvious scrivener's error occurred.

Procedural irregularities notwithstanding, we first address the nature of Curry's offenses. In its sentencing order, the trial court stated that the "series of crimes charged in this case represents [an] ongoing course of criminal conduct, not one of crimes [that] could have occurred on impulse, [involving] multiple victims including one who was over 65 years of age and disabled." *Id.* Curry argues that the nature of his offenses was rather innocuous because he was not the principal person presenting the checks for payment. However, the record shows that he created and forged the counterfeit checks and that when it was no longer safe for him to personally present the checks for payment, he used other individuals to cash the checks and then split the money with them. Many of these associates were either drug users or were otherwise financially strapped. Curry often drove them to the establishments to present the checks and waited for them to obtain the cash so that he could split it immediately. Thus, he was both mastermind and facilitator of the illegal transactions.

We next examine the character of the offender. Curry cites his active involvement in a community youth boxing program as indicative of strong character. Laudable though such involvement may be, we note that he used the youth boxing program as a cover story when he was questioned at Martin's, stating that the counterfeit checks were donations associated with his boxing clinics. Moreover, his extensive criminal history reflects his total disregard for the law. His criminal record spans decades and several jurisdictions and includes felony convictions in Texas, South Carolina, and Indiana for deceptive and sometimes violent offenses. For example, his felony record includes convictions for aggravated kidnapping, marijuana possession with intent to deliver, insurance fraud, and counterfeiting. His misdemeanor convictions include battery resulting in bodily injury, false reporting to police, and evading arrest. Furthermore, over the course of his criminal career, he has been afforded lenient sentencing options such as probation and community corrections, but has violated the conditions on numerous occasions. With respect to the instant offenses, he preyed upon individuals who were desperate for cash, either because of drug use or otherwise and induced them to do what he could no longer safely do—present the checks for cashing. He defrauded local businesses and twice defrauded the elderly and disabled Martha George.

In sum, we find Curry to be a career criminal with a propensity to defraud and injure others. He has failed to meet his burden of proving that his sentence is inappropriate in light of his character and the nature of his offenses. As such, we affirm his sentence. However, we remand with instructions for the trial court to attach the habitual offender sentence to one of the underlying felonies and to correct the scrivener's error regarding the aggregate term.

Affirmed and remanded.

NAJAM, J., and ROBB, C.J., concur.