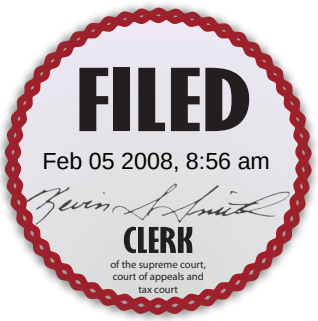

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT CAMPBELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0706-CR-344
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0608-FC-162233

February 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF FACTS

Robert Campbell appeals his convictions for four counts of class D felony theft.[1] Campbell also appeals the trial court's order that his bond be retained.

We affirm in part and reverse in part.

ISSUES

1. Whether there is sufficient evidence to support the convictions.

2. Whether the trial court abused its discretion in instructing the jury.

3. Whether the trial court erred in ordering that Campbell's cash bond be retained.

FACTS

Campbell owned Windows America, Inc., a home improvement company, which sold and installed windows, doors, and siding. Windows America maintained an account at National City Bank. Campbell was the only person with access to that account. When salespersons received checks from customers of Windows America, they would give the checks to Windows America's office administrator, Brenda Hostetter. Hostetter would record the amounts and then give the checks to Campbell to be deposited into the National City Bank account.

At the end of May of 2005, Windows America relocated to a larger space because "it was expanding." (Tr. 103). At some time in late June or early July of 2005, Campbell notified his employees that he was going to cease operations due to financial difficulties.

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[1] Ind. Code § 35-43-4-2.

Campbell therefore instructed his employees that the company would attempt to finish any jobs in progress but his employees should not enter into any more contracts.

On May 19, 2005, Deana and Terry Jones met with David Wilson, a sales representative for Windows America, to discuss replacing the siding on the Joneses' home. The Joneses entered into a sales agreement with Windows America for the purchase and installation of siding for a total price of $15,990.00. The Joneses intended to finance the project by taking a loan out on their residence; Windows America referred the Joneses to a bank through which the Joneses could refinance their mortgage.

On or about June 29, 2005, the Joneses received a check in the amount of $7,995.00 from Pioneer Title, LLC. Pioneer Title, LLC made the check payable to the order of Windows America and the Joneses. On June 30, 2005, Campbell went to the Joneses' residence and retrieved the check. Campbell told the Joneses that with the first payment, "they could order supplies and get started on the work." (Tr. 337). The check was deposited into Windows America's bank account the next day.

In July of 2005, after repeated telephone calls from the Joneses inquiring about the status of their project, Campbell informed Mrs. Jones that Windows America would supply the siding that month. Windows America, however, never provided the siding or returned the Joneses' deposit.

In June of 2005, Nils and Jean Bang contacted Windows America about having their windows replaced. On June 30, 2005, Mrs. Bang signed a sales agreement with Windows America and provided a check in the amount of $1,665.00 to Windows America's salesperson, Randy Leestma, as a deposit. The check was deposited into

Windows America's bank account and cleared the Bangs' account on or about July 1, 2005.

Leestma informed the Bangs that the replacement windows would arrive in approximately six weeks. Despite repeated telephone calls from the Bangs to Windows America's office, however, Windows America never supplied the windows or returned the Bangs' deposit.

In April of 2005, Chuck Winings, a representative for Windows America, visited the home of Roger Lee and Veronica Albrecht-Lee to discuss building a sunroom and to take preliminary measurements. On May 4, 2005, the Lees signed a sales agreement with Windows America and provided a check in the amount of $2,000.00 to Winings as a deposit. The check was deposited to Windows America's account and cleared the Lees' bank account on or about May 9, 2005.

In June of 2005, Windows America's subcontractor completed the sunroom's foundation. On June 23, 2005, the Lees provided a check in the amount of $15,642.00 per the sales agreement. The check was deposited to Windows America's account on or about June 27, 2005. A representative with Windows America informed the Lees that "within another week Windows America would come in and bring the supplies, the material to do the framing and start with the framing." (Tr. 361).

When the Lees did not hear from Windows America, Mrs. Lee telephoned Windows America's office in late July or early August of 2005 and spoke to a man who identified himself as Campbell. Campbell told Mrs. Lee that "they were busy. That they had a lot of projects going and a large project and the work had been delayed." (Tr. 362).

After several unreturned telephone calls, the Lees went to Windows America's office in the middle of August of 2005. The Lees met with Campbell and "asked him what was going on, why the work has not continued." (Tr. 365). Campbell replied that "the company went into financial problems, they ran out of money and that's why they couldn't continue the work." (Tr. 366). When the Lees demanded their money back, Campbell assured the Lees that he would "start paying [the Lees their] money back." (Tr. 366).

On August 25, 2005, Mr. Lee received the following electronic mail message from Campbell:

> You have asked us to cancel our contract with you dated May 4, 2005. This message is notification that this contract is cancelled, and you have no further obligation to Windows America, Inc.
>
> As part of your contract you gave us two progress payments. As the work we have performed to date has less value than the combined amount of these payments, we will refund the balance due you as quickly as possible.

(State's Ex. 35).

On October 1, 2005, Campbell telephoned the Lees and told them "[n]ot to contact him again and leave him alone." (Tr. 367). The Lees never received their money.

On June 28, 2005, Stephen Elliott met with Leestma and entered into a sales agreement for the purchase and installation of storm windows. Per the sales agreement, Elliott wrote a check in the amount of $699.50 as a deposit with $699.50 due upon completion. The check was deposited to Windows America's account and cleared Elliott's checking account on or about June 30, 2005.

Leestma informed Elliott that someone would "call [Elliott] back in a week or two to actually do the exact measurements so that they could place an order." (Tr. 447). When no one from Windows America came to take measurements, Elliott telephoned the Windows America office. In August of 2005, Elliott spoke with someone who identified himself as Campbell. When Elliott explained the situation, Campbell said that "[h]e would look into it and get back with [Elliott]." (Tr. 448). Elliott never spoke with Campbell again despite telephoning Campbell approximately fifty times. Elliott never received the windows or his deposit.

During an investigation of homeowners' complaints against Windows America, an officer with the Grand Jury Division of the Marion County Prosecutor's Office subpoenaed Windows America's bank records. The bank records revealed that from January of 2005 through September of 2005, payments on an automobile loan, two fitness club memberships, two credit cards, and a home equity line of credit or loan were made from Windows America's bank account.

On August 29, 2006, the State charged Campbell with one count of corrupt business influence, a class C felony; and twelve counts of class D felony theft.[2] The trial court ordered a surety bond in the amount of $5,000.00, which the trial court reduced to a cash bond of $2,500.00 on September 1, 2006. Campbell paid the bond on October 17, 2006. On March 16, 2007, the State dismissed one count of theft.

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[2] The State charged that Campbell knowingly or intentionally exerted unauthorized control over the property of Jean Bang, Steven Coons, Carl Weiler, Stephen Elliott, Eric Nolan, Clyde Stewart, Essie Jones, Roger Lee, Brenda Kelly, Deana Jones, Gloria Mickley, and Maria Martinez, with the intent to deprive them of any part of its value or use.

The trial court commenced a jury trial on March 19, 2007, after which the jury found Campbell guilty of four counts of class D felony theft for knowingly or intentionally exerting unauthorized control over the property of Jean Bang, Stephen Elliott, Roger Lee, and Dean Jones, with the intent to deprive them of any part of its use or value.

The trial court held a sentencing hearing on May 17, 2007 and sentenced Campbell to suspended sentences of one year on each count, with two counts to run consecutively and two counts to run concurrently. The trial court also ordered restitution in the amount of $28,001.05.

On May 23, 2007, the State filed a motion, seeking to have Campbell's cash bond applied toward restitution or, in the alternative, payment of court costs and fees. The trial court held a hearing on the State's motion on June 22, 2007. The trial court ordered that the cash bond be held "in escrow until the case is resolved by appeal." (Tr. 670).

Additional facts will be provided as necessary.

DECISION

1. Sufficiency of the Evidence

Campbell asserts that the evidence was insufficient to sustain his convictions for theft. Specifically, Campbell argues that the State "failed to prove Campbell intended to permanently deprive [Bang, Elliott, Lee and Jones] of the value or use of their down payments." Campbell's Br. 8.

> 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. 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. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Pursuant to Indiana Code section 35-43-4-2(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 D felony." Indiana Code section 35-43-4-2(a) does not require the State to prove that a defendant intended to deprive the owner of his or her property permanently. *Bennett v. State*, No. 49S02-0801-CR-12, slip op. at 2 (Ind. Jan. 9, 2008).

Here, the evidence shows that in late June or early July,[3] Campbell knew that Windows America was having financial difficulties and that he would have to cease operations. Nonetheless, Campbell accepted deposits for the purchase of windows and siding from Jones, Bang, Lee and Elliott in late June of 2005; Campbell deposited those checks into Windows America's bank account. Despite making substantial down payments, Windows America's customers neither received the items ordered nor a refund

[3] Hostetter testified that Campbell told her "that he had no more investors in the company and was not going to be able to financially keep the company going" at the end of June of 2005. (Tr. 73). Wilson testified that Campbell informed his staff of the company's financial difficulties during a meeting "close to the end of June," (Tr. 260), or "before July 4th." (Tr. 262).

of their money. We find the evidence sufficient to support Campbell's convictions for theft.

2. Jury Instructions

Campbell asserts the trial court erred in instructing the jury. Specifically, Campbell argues that "[t]he trial court erred by giving jury instructions 21I and 21J because no evidence in the record supported giving them and because they were not correct statements of law in this case." Campbell's Br. 13.

The pertinent instructions read as follows:

> INSTRUCTION NO. 21I
>
> A person who knowingly or intentionally aids, induces, or causes another person to commit an offense, commits that offense, even if the other person:
>
> 1. Has not been prosecuted for the offense;
> 2. Has not been convicted of the offense; or
> 3. Has been acquitted of the offense.
>
> There is no distinction between the criminal responsibility of a principal and that of an accomplice.
>
> To aid is to knowingly support, help, or assist in the commission of a crime.
>
> INSTRUCTION NO. 21J
>
> The term "person" is defined by law as meaning a human being, corporation, partnership, unincorporated association, or government entity.

(App. 116).

> [T]he purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Instructing the jury is generally within the trial court's discretion and is reviewed only for an abuse of that discretion. Instructions are to be read

> together as a whole and we will not reverse for an instructional error unless the instructions, as a whole, mislead the jury. A defendant is entitled to a reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights. Finally, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise.

Buckner v. State, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). "An instruction error will result in reversal when the reviewing court 'cannot say with complete confidence' that a reasonable jury would have rendered a guilty verdict had the instruction not been given." *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (citing *White v. State*, 675 N.E.2d 345, 349 (Ind. Ct. App. 1996), *trans. denied*).

Here, the trial court also instructed the jury as follows:

> The crime of Theft, a Class D Felony with which the Defendant is charged in Counts 2-12, is defined as follows:
>
> A person who knowingly or intentionally exerts unauthorized control over the property of another person, with intent to deprive the other person of any part of its value or use, commits Theft, a Class D felony.
>
> To convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The Defendant, Robert C. Campbell,
> 2. knowingly,
> 3. exerted unauthorized control
> 4. over property of another person,
> 5. with intent to deprive the other person of any part of its value or use.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Theft, a Class D felony . . . .

(App. 111).

The evidence supports Campbell's convictions for theft. Thus, a reasonable jury would have rendered a guilty verdict even if the instructions had not been given. Accordingly, the instruction error, if any, does not require reversal. *See Randolph v. State*, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004) ("Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict."), *trans. denied*.

3. Retentions of Cash Bond

Campbell asserts that the trial court "erred by ordering Campbell to turn his money over to probation to be held in escrow pending appeal" because Campbell never executed an agreement allowing the trial court to retain his cash bond. Campbell's Br. 7.

Indiana Code section 35-33-8-3.2(a)(1) provides as follows:

> If the court requires the defendant to deposit cash or cash and another form of security as bail, the court may require the defendant and each person who makes the deposit on behalf of the defendant to execute an agreement that allows the court to retain all or a part of the cash to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted.

The State concedes this issue. We therefore reverse the trial court's order that Campbell's cash bond be held in escrow.

Affirmed in part and reversed in part.

BAKER, C.J., and BRADFORD, J., concur.