

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

DONALD E. BAIER
Baier & Baier
Mount Vernon, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY D. JERRELLS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DEAGO TYREE HOOPER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 65A01-1005-CR-221

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0907-FB-61

March 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Two grown men approached a fourteen-year-old boy and asked him if he had any money. After the boy responded that he did not, one of the men asked the boy if they could search him for money. When the boy refused, that man struck him in the face and held him on the ground. The boy reached in his pocket and handed the man twenty-five dollars. Following a jury trial, Deago Tyree Hooper was convicted of class B felony robbery. On appeal, Hooper claims that the evidence is insufficient to support his conviction and also that the trial judge made an incorrect statement regarding the State's evidence which unduly influenced the jury. Finding sufficient evidence to support the conviction and concluding that Hooper suffered no prejudice as a result of the trial judge's statement, we affirm.

Facts and Procedural History

Fourteen-year-old N.J. mowed lawns in Mount Vernon for his summer job. At approximately 8:30 p.m. on July 7, 2009, N.J. was walking home after retrieving some equipment from one of the lawns he had mowed earlier that day. As he was walking, two men who had been sitting on a nearby porch stood up and approached him. One of the men asked N.J., "Do you have a light?" Tr. at 10. N.J. responded that he did not, and then the man asked, "Do you have five bucks?" *Id.* N.J. again responded that he did not. The man asked if he could search N.J., but N.J. refused and started to walk away. The man who had been talking to N.J. punched N.J. in the face, and after N.J. fell to the ground, held N.J. down with his foot pressed to the side of N.J.'s head. Realizing that he could not get away, N.J. reached in his back pocket, pulled out twenty-five dollars, and gave it to the man. N.J. then

said, “[J]ust let me up.” *Id.* at 12. The man removed his foot, and as N.J. got up, both men told N.J. not to tell the police about what had happened. N.J. then distracted the men by pointing behind them and pretending that he saw the police coming. As the men momentarily turned away, N.J. took off running. N.J., who was injured and bleeding, ran to the home of his neighbor, Mount Vernon police officer Bryan Angel, to report the robbery.

The following day, N.J. tentatively identified a picture of Hooper out of a photo array as the assailant who had taken his money. Then, on July, 10, 2009, N.J. saw Hooper working at a Dollar General Store and recognized him with “a hundred percent” certainty as the man who had spoken to him, punched him, and taken his money. Tr. at 20. N.J. reported to police that Hooper was the man who had robbed him. On July 13, 2009, the State charged Hooper with class B felony robbery. A jury trial was held on March 24, 2010. The jury found Hooper guilty as charged. This appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence

Hooper first contends the evidence presented by the State was insufficient to support his conviction. When reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or assess the credibility of the witnesses. *Treadway v. State*, 924 N.E.2d 621, 639 (Ind. 2010). Instead, we look to the evidence and reasonable inferences drawn therefrom that support the verdict, and we will affirm if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

To convict Hooper of class B felony robbery, the State was required to prove that Hooper (1) knowingly or intentionally; (2) took property from; (3) N.J.; (4) by using or threatening the use of force; (5) which resulted in bodily injury to N.J. *See* Ind. Code § 35-42-5-1. Hooper contends that he lacked the requisite criminal intent to take N.J.’s money because N.J. voluntarily “gave” his money to Hooper. Appellants Br. at 7. In short, Hooper’s assertion is ridiculous. The evidence is clear that Hooper, along with another adult male, asked fourteen-year-old N.J. for five dollars. When N.J. stated that he did not have money, Hooper then pressured N.J. further by asking N.J. if he could search him for money. When N.J. refused and tried to leave the scene, Hooper punched N.J. and held the injured and bleeding youngster on the ground with his foot. N.J. had the presence of mind to realize that Hooper clearly had “the upper hand” and reached in his pocket and gave Hooper twenty-five dollars. Tr. at 12. From this evidence, the jury could reasonably infer that Hooper knowingly or intentionally took property from N.J. by using force which resulted in bodily injury to N.J. The State presented sufficient evidence to sustain Hooper’s robbery conviction.

II. Misstatement of the Evidence

We next address Hooper’s assertion that the trial judge made an incorrect statement regarding the evidence during the State’s closing argument. During closing argument the prosecutor summarized some of the evidence by stating in part, “When you hand all of the money you have got over, they go through your pockets again to make sure. How is that not robbery[?]” Tr. at 122. Hooper objected and argued, “I am going to object, Your Honor.

The Prosecutor is testifying at this point. There was no evidence that anybody went through anybody's pockets.” *Id.* The deputy prosecutor responded that her argument was her recollection of how N.J. testified. The trial judge responded, “That is my memory also . . . I think we will have to leave it up to the jury. Whatever their memory is, of course, is important, but I will allow the final argument to continue.” *Id.* The record reveals that N.J. did not in fact testify that anyone searched his pockets after he gave Hooper his money.

Hooper contends that the trial judge's incorrect statement regarding the evidence “may have” unduly influenced the jury. Appellant's Br. at 10. However, Hooper fails to cite any legal authority on this issue, and his sparse argument fails to explain how the jury may have been influenced and how such influence in fact prejudiced him or deprived him of a fair trial. Hooper's failure to put forth cogent argument on this issue waives any error for our review. *See Ind. Appellate Rule 46(A)(8)(a); Barrett v. State*, 837 N.E.2d 1022, 1030 (Ind. Ct. App. 2005), *trans. denied* (2006).

Waiver notwithstanding, the judge's slight misstatement of evidence was immediately cured by the judge's follow-up explanation that essentially admonished the jurors that they should rely on their own recollection of the evidence. Where a trial court adequately admonishes the jury, such admonishment is presumed to cure any error that may have occurred. *Johnson v. State*, 901 N.E.2d 1168, 1173 (Ind. Ct. App. 2009).¹ Furthermore, the evidence commented on by the trial judge was immaterial to the State's burden of proof. As

¹ We note that, in addition to the trial court's explanation, the deputy prosecutor went on to remind the jurors that they should rely on their own “recollection of the witness testimony” and what they “heard from the witness stand.” Tr. at 122.

noted above, the State presented sufficient evidence to show that Hooper knowingly took property from N.J. by using force which resulted in bodily injury to N.J. Whether anyone went through N.J.'s pockets after he had already turned over his money is immaterial. Accordingly, Hooper has failed to show that he suffered prejudice as a result of the trial judge's incorrect statement. Although we disapprove of a trial judge commenting on the evidence as happened here, at most, the judge's incorrect statement constituted harmless error.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.