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FILED
Oct 14 2011, 10:01 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

MATTHEW SPOONEMORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-1102-CR-64
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0911-FD-153

October 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Matthew Spoonemore appeals his conviction and sentence for Class D felony theft. Spoonemore raises several issues on appeal. We find that the trial court did not abuse its discretion in admitting a portion of Spoonemore's videotaped interview with an investigator from the Sheriff's Department because it does not constitute hearsay, that Spoonemore did not establish a prima facie case of discrimination under *Batson*, and that the trial court did not abuse its discretion in ordering him to pay $29,700 in restitution to his employer. However, we find that the trial court was mistaken as to its authority to reduce his Class D felony to a Class A misdemeanor under Indiana Code section 35-50-2-7 and therefore remand to the trial court on this issue.

Facts and Procedural History

Spoonemore was an employee of Indiana Ticket Company in Muncie, Indiana. At some point it was discovered that brass knife holders, which were used inside equipment to hold knives in order to cut strips of paper into smaller strips, were missing from storage. Spoonemore did not have permission to take the brass knife holders from Indiana Ticket Company. Yet, on three occasions, Spoonemore sold a total of approximately 170 pounds of brass knife holders for scrap metal to Hartford Iron & Metal. Because Spoonemore had to present his driver's license when he sold the brass knife holders, he was a suspect. When Spoonemore sold the brass knife holders, he told the employees at Hartford Iron & Metal that he "got [the brass knife holders] from [his] work." Tr. p. 38; *see also id.* at 47.

Kurt Walthour, an investigator with the Delaware County Sheriff's Department, questioned Spoonemore. Investigator Walthour advised Spoonemore of his rights, and Spoonemore signed an advisement of his rights. The following discussion, which was videotaped, occurred between Investigator Walthour and Spoonemore:

> [Walthour]: -- you need to be honest with me, okay? We just left up there [Hartford Iron & Metal]. We talked to the guys that took it in when you brought it in --
>
> [Spoonemore]: Uh-huh.
>
> [Walthour]: -- we got a print-out (inaudible) of your driver's license (inaudible) and you took it in there and sold it. And we've got pictures of items that were taken from work.
>
> [Spoonemore]: Uh-huh.
>
> [Walthour]: And that's what was taken up there, okay? And the guy that brought -- that you took the stuff into in the five (5) gallon buckets, you told him that you got it from work.
>
> [Spoonemore]: Oh, I did not. I did not tell him I got it from work.

Id. at 109. Spoonemore, however, later admitted during the interview that he took the brass pieces from work. *Id.* at 112-113 ("I promise you on everything the only thing that was from work was those brass pieces."; "The only thing that was from work was those brass pieces."); *see also id.* at 117.

The State charged Spoonemore with Class D felony theft for the theft of the brass knife holders. Ind. Code § 35-43-4-2(a); Appellant's App. p. 16.[1] Spoonemore filed a motion to redact the above portion of the videotaped statement wherein Investigator

[1] The State also charged Spoonemore with theft in connection with the theft of some copper cable, but the jury acquitted him of this charge.

Walthour claimed that Spoonemore told an employee of Hartford Iron & Metal that he "had stolen the items in question." Appellant's App. p. 18. Spoonemore alleged that Walthour's assertion constituted inadmissible hearsay. The trial court denied Spoonemore's motion to redact. *Id.* at 23.

Following voir dire, the State exercised one of its peremptory challenges on black juror Anthony Rowe, to which Spoonemore objected. The State responded that its investigator had provided information that Rowe had a criminal history, including a conviction for a Class A misdemeanor, and "he's been arrested many many times for Battery." Tr. p. 11. The judge also noted that "my brother and Mr. Rowe have been good friends, I think since high school, so I guess I kind of had some general knowledge of Mr. Rowe's issues." *Id.* at 10. The State noted that it did not exercise a peremptory challenge on the other black juror. Spoonemore argued as follows:

> Simpl[y] because somebody's been arrested for something doesn't mean they're guilty of anything. If the only conviction we have here is an A misdemeanor, I don't think that's a sufficient basis to exclude him. There hasn't been any showing that he couldn't have been a fair juror in this case. He wasn't even asked any questions individually on that.

Id. at 11-12. The trial court overruled Spoonemore's objection, stating

> I know it's a little bit unusual, but I have some personal knowledge of some of the things my brother has related to me that led me to believe that he might have some at least knowledge of criminal activity in the City of Muncie, I guess, without incriminating my brother and all. But anyway, I'll overrule the objection . . . .

Id. at 12.

During trial, Spoonemore objected to the above-quoted portion of his videotaped interview with Investigator Walthour on grounds of hearsay. The trial court overruled

Spoonemore's objection. Two Hartford Iron & Metal employees, Jonathan Lugar and Justin Cahue, testified that Spoonemore told them that he got the brass knife holders from work. *Id.* at 38, 47. Spoonemore testified in his own defense. He admitted taking the brass knife holders from a dumpster at work and then selling them to Hartford Iron & Metal for scrap metal. *Id.* at 136-37. He claimed he had permission to take the brass from a dumpster at work from Supervisor Tim Gibbs. *Id.* at 137. The State then called Gibbs, who was not an original witness at trial. Gibbs testified that the brass knife holders were not in the dumpster and that he did not give Spoonemore permission to take them. The jury found Spoonemore guilty of Class D felony theft.

At sentencing, Indiana Ticket Company requested restitution in the amount of $29,700. Plant manager Theodore Shockley testified about how the company arrived at this figure. Shockley said the company originally priced the brass knife holders at $150. He contacted the company that made them, and they were now priced at $195. However, Indiana Ticket Company requested only $150. *Id.* at 162. Indiana Ticket Company knew that it originally had 252 brass knife holders, but it did not keep a current inventory. Based on the weight of the brass that Spoonemore sold to Hartford Iron & Metal and the fact that Indiana Ticket Company had ten brass knife holders remaining, Indiana Ticket Company calculated that Spoonemore stole 198 brass knife holders ($150 x 198 = $29,700). The trial court "reluctantly" ordered Spoonemore to pay $29,700 in restitution. *Id.* at 189.

Finally, Spoonemore asked the trial court to reduce his Class D felony to a Class A misdemeanor pursuant to Indiana Code section 35-50-2-7. The trial court, however, was

mistaken as to its authority under this section and denied Spoonemore's request. *Id.* at 185-188. Accordingly, the trial court sentenced Spoonemore on the Class D felony to eighteen months, all suspended to probation. Spoonemore filed a motion to correct errors, which the trial court denied.

Spoonemore now appeals.

Discussion and Decision

Spoonemore raises four issues on appeal. First, he contends that the trial court erred in admitting the portion of his videotaped interview where Investigator Walthour asserted that Spoonemore told the Hartford Iron & Metal employees that he got the brass knife holders from work because it constitutes inadmissible hearsay. Second, Spoonemore contends that the State improperly used its peremptory challenge to strike black juror Rowe and that the trial court erred in denying his objection. Third, Spoonemore contends that the trial court erred in denying his motion to reduce his Class D felony to a Class A misdemeanor because the trial court was mistaken as to its authority to do so. Finally, he contends that the trial court erred in ordering him to pay Indiana Ticket Company $29,700 in restitution.

I. Hearsay

Spoonemore contends that the trial court erred in admitting the portion of his videotaped interview where Investigator Walthour asserted that Spoonemore told the Hartford Iron & Metal employees that he (Spoonemore) got the brass knife holders from work because it constitutes inadmissible hearsay. A trial court has broad discretion in ruling on the admission or exclusion of evidence. *Kimbrough v. State*, 911 N.E.2d 621,

631 (Ind. Ct. App. 2009). The trial court's ruling on the admissibility of evidence will be disturbed on review only upon a showing of an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's ruling is clearly against the logic, facts, and circumstances presented. *Id.* Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. Ind. Evidence Rule 103.

As a general principle, hearsay, which is an out-of-court statement offered to prove the truth of the matter asserted, is not permitted at trial. Ind. Evidence Rule 801(c). A statement is not hearsay, though, if it is not offered to prove the truth of the matter asserted. *Smith v. State*, 721 N.E.2d 213, 216 (Ind. 1999). The Indiana Supreme Court has held that a detective's questions and statements during an interview with a defendant that are designed to elicit a response from the defendant are not presented to prove the truth of the matters asserted. *Id.*; *see also Strong v. State*, 538 N.E.2d 924, 928 (Ind. 1989); *Butler v. State*, 951 N.E.2d 641, 645 (Ind. Ct. App. 2011).

Without any analysis, Spoonemore argues on appeal that the police interview in his case is like the police interview in *Smith*. Appellant's Br. p. 5. In *Smith*, our Supreme Court concluded that the detective's statements to the defendant that half the people in jail called him to say that the defendant committed the crime were assertions of fact rather than mere questions designed to elicit a response. 721 N.E.2d at 216. Accordingly, the Court held that their admission was erroneous. *Id.*

This case is distinguishable from *Smith*. Here, Investigator Walthour told Spoonemore information that Spoonemore himself was reported to have told the

employees at Hartford Iron & Metal. Moreover, Walthour's comment was designed to elicit a response from Spoonemore and therefore was not offered as proof of the facts asserted therein. *Smith*, 721 N.E.2d at 216; *Strong*, 538 N.E.2d at 928. Accordingly, Investigator Walthour's assertion during the interview that Spoonemore told the Hartford Iron & Metal employees that he got the brass knife holders from work is not hearsay.

In any event, even if the trial court erred in admitting Investigator Walthour's assertion because it constitutes hearsay, Spoonemore's substantial rights were not affected. Spoonemore later admitted during the interview that he took the brass knife holders from his work, and Hartford Iron & Metal employees Lugar and Cahue testified at trial that Spoonemore told them that he got the brass from his work. We therefore affirm the trial court on this issue.

II. *Batson* Challenge

Spoonemore, without citing *Batson v. Kentucky*, 476 U.S. 79 (1986), contends that the State improperly used its peremptory challenge to strike black juror Rowe and that the trial court erred in denying his objection. In *Batson*, the United States Supreme Court held that a prosecutor's use of peremptory challenges to strike potential jurors solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Jeter v. State*, 888 N.E.2d 1257, 1262-63 (Ind. 2008). *Batson* set forth a three-step process for challenging the State's allegedly discriminatory exercise of peremptory strikes. *Id.* at 1263. The party raising the *Batson* challenge must first make a prima facie showing that the other party exercised a peremptory challenge on the basis of race. *Id.* (citing *Batson*, 476 U.S. at 96). The burden then shifts to the party

exercising the peremptory strike to present a race-neutral explanation for striking the juror. *Id.* (citing *Batson*, 476 U.S. at 97). Finally, the trial court must decide whether the party making the *Batson* challenge has carried its burden of proving purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98). "Upon appellate review, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference, and will be set aside only if found to be clearly erroneous." *Forrest v. State*, 757 N.E.2d 1003, 1004 (Ind. 2001); *see also Killebrew v. State*, 925 N.E.2d 399, 401 (Ind. Ct. App. 2010), *trans. denied*.

The removal of some black jurors by peremptory challenge does not, by itself, raise an inference of racial discrimination. *Hardister v. State*, 849 N.E.2d 563, 576 (Ind. 2006); *see also Highler v. State*, 854 N.E.2d 823, 827 (Ind. 2006). In *Hardister*, our Supreme Court determined that where the defense had presented evidence that the State exercised five of six peremptory challenges to strike potential black jurors but did not strike the two remaining black jurors, one of whom was struck by the defense, no prima facie case of discrimination had been established. 849 N.E.2d at 576. Here, the record discloses that the State removed juror Rowe by peremptory challenge but did not remove the remaining black juror on the venire. Because Spoonemore does not establish a prima facie case, the burden never shifted to the prosecution to provide a race-neutral explanation.

Nevertheless, the State still would have prevailed over the *Batson* challenge. *Batson*'s second step requires only that the explanation given for the peremptory strike be facially race-neutral. The State provided evidence that Rowe had a conviction for a Class

A misdemeanor and numerous arrests for battery. The use of a peremptory challenge does not violate *Batson* where the challenged individual or a family member has had previous involvement with the criminal justice system. *Douglas v. State*, 636 N.E.2d 197, 199 (Ind. Ct. App. 1994). We affirm the trial court on this issue.

III. Trial Court's Authority to Reduce a D Felony to an A Misdemeanor

Spoonemore contends that the trial court erred in denying his motion to reduce his Class D felony to a Class A misdemeanor because the trial court was mistaken as to its authority to do so. At sentencing, defense counsel asked the trial court to enter Spoonemore's conviction as a Class A misdemeanor under Indiana Code section 35-50-2-7, which provides:

> (a) A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 ½) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).
>
> (b) Notwithstanding subsection (a), if a person has committed a Class D felony, the court *may* enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony if:
>
> > (1) the court finds that:
> >
> > > (A) the person has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor; and
> > >
> > > (B) the prior felony was committed less than three (3) years before the second felony was committed;
> >
> > (2) the offense is domestic battery as a Class D felony under IC 35-42-2-1.3; or
> >
> > (3) the offense is possession of child pornography (IC 35-42-4-4(c)).

> The court shall enter in the record, in detail, the reason for its action whenever it exercises the power to enter judgment of conviction of a Class A misdemeanor granted in this subsection.

(Emphasis added). Thus, a trial court has the discretion to enter judgment of conviction for a Class A misdemeanor unless certain conditions are met, none of which apply here, however. The trial court noted that the State's consent was needed, but the court cited another section, Indiana Code section 35-38-1-1.5 (expressly noting that the prosecuting attorney must consent). When defense counsel clarified that the State's consent was not needed under Section 35-50-2-7, the trial court nevertheless found:

> This is one (1) of those situations where I think the law is the law, but I think the law leads to a bad result. But apparently, there's nothing I can do about it. And I'm not real – I don't know. . . . Okay, well, like I said, I don't have a choice, so, I will find that [Spoonemore] was found guilty by the jury of a Class D felony, and that I'm required by law, if the State doesn't agree to it, I cannot reduce that. So I will find [Spoonemore] guilty of the Class D felony, judgment of conviction.

Tr. p. 187-88. Because we find that the trial court was mistaken as to its authority, we remand for the trial court to determine whether it wishes to exercise its discretion and enter judgment as a Class A misdemeanor. The State also agrees that this is the appropriate remedy if we were to find that the trial court was mistaken as to its authority. *See* Appellee's Br. p. 13 ("[I]f this Court finds that the trial court was mistaken as to its authority, then the remedy is to remand for the trial court to decide whether to enter judgment as a class A misdemeanor.").

IV. Restitution

Finally, Spoonemore contends that the trial court erred in ordering him to pay Indiana Ticket Company $29,700 in restitution.

A trial court has the authority to order a defendant convicted of a crime to make restitution to the victim of the crime. *Wolff v. State*, 914 N.E.2d 299, 303 (Ind. Ct. App. 2009). The purpose of a restitution order is to impress upon the criminal defendant the magnitude of the loss he has caused and to defray costs to the victim caused by the offense. *Id.* An order of restitution is a matter within the sound discretion of the trial court, and we will only reverse upon a showing of an abuse of that discretion. *Id.* An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.*

Indiana Code section 35-50-5-3 governs orders for restitution and provides in pertinent part:

> (a) Except as provided in subsection (i) or (j), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may . . . order the person to make restitution to the victim of the crime . . . . The court shall base its restitution order upon a consideration of:
>
> > (1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate);

The amount of actual loss sustained by the victim is a factual matter that can be determined only upon the presentation of evidence. *Rich v. State*, 890 N.E.2d 44, 49 (Ind. Ct. App. 2008), *trans. denied.*

At sentencing, plant manager Shockley testified that he valued each brass knife holder at $150 even though they were currently valued at $195. Tr. p. 162. Thus, contrary to Spoonemore's argument on appeal, the request for restitution was not based on the cost of a new version of the knife holders. In any event, the statute allows for restitution to be based on replacement cost if repair is inappropriate.

Spoonemore also disputes Indiana Ticket Company's methodology of determining the number of brass knife holders he sold to Hartford Iron & Metal. He essentially claims that he should not be punished for Indiana Ticket Company's failure to maintain more precise inventory records. However, Spoonemore does not dispute that Indiana Ticket Company originally had 252 brass knife holders and that they had 10 remaining at the time of trial. He also does not dispute the weight of the brass that he sold to Hartford Iron & Metal. Based on the weight of the brass that Spoonemore sold to Hartford Iron & Metal, Shockley calculated that Spoonemore sold 198 brass knife holders (198 x $150 = $29,700). Shockley did not speculate as to where the remaining knife holders might be. Indiana Ticket Company presented sufficient evidence to support its calculation. The trial court did not abuse its discretion in ordering Spoonemore to pay Indiana Ticket Company $29,700 in restitution.

We affirm in part and reverse and remand in part.

FRIEDLANDER, J., and DARDEN, J., concur.