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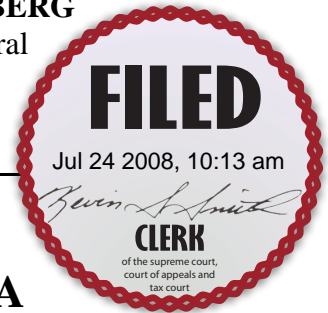
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**IN THE
COURT OF APPEALS OF INDIANA**

M.W., a Minor,)
)
Appellant-Respondent,)
)
vs.) No. 49A04-0712-JV-717
)
STATE OF INDIANA,)
)
Appellee-Petitioner.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Beth Jansen, Magistrate
Cause Nos. 49D09-0706-JD-1977 and 49D09-0708-JD-2477

July 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

M.W. appeals his adjudications of delinquency for battery, intimidation, and two counts of criminal mischief. We affirm.

Issues

M.W. raises the following issues for review:

- I. Whether the juvenile court abused its discretion in allowing the State to use a written estimate to refresh the victim's recollection regarding damages to his vehicle;
- II. Whether the State presented evidence sufficient to sustain the juvenile court's true finding on the intimidation charge;
- III. Whether the State's evidence on the battery charge materially varied from the allegations in its charging information;
- IV. Whether the State presented evidence sufficient to sustain the juvenile court's true finding on the two criminal mischief charges; and
- V. Whether the juvenile court abused its discretion in ordering M.W. to pay \$472 out-of-pocket as a condition of probation.

Facts and Procedural History

The facts most favorable to the judgment indicate that between 11:00 p.m. and midnight on May 24, 2007, John Oesterling and his son, C.O., were traveling north on Keystone Avenue after shopping at a nearby Wal-Mart. Oesterling saw M.W., a neighbor boy with whom he was familiar, throw a large rock from the pile of rubble upon which M.W. and two other boys were standing. The rock hit Oesterling's vehicle, and Oesterling stopped, let C.O. out of the vehicle, and turned around to shine his headlights on M.W. C.O. chased M.W. to the Oesterling home nearby. When Oesterling reached the house, he called the police. M.W. then told the Oesterlings that their house could burn. Oesterling obtained an

estimate for damages to his vehicle. On May 31, 2007, police arrested M.W. in connection with the May 24 incident.

On the afternoon of June 15, 2007, Oesterling returned home to find M.W. and another boy throwing rocks at C.O. and C.O.'s younger brother. M.W. threw a handful of rocks at C.O., striking him on the chest, stomach, and leg. When Oesterling arrived, M.W. threw rocks at him and his vehicle. Oesterling confronted M.W. and told him to leave, and M.W. cursed at him, "flipped him off," and told him his house could burn. Tr. at 12-13. Oesterling obtained another estimate for damages to his vehicle.

On June 22, 2007, the State charged M.W. with battery and criminal mischief¹ for the May 24 incident. On August 10, 2007, the State charged M.W. under a separate cause number with criminal mischief and intimidation² in connection with the June 15 incident.

On November 2, 2007, the juvenile court held a hearing at which it disposed of both cause numbers and adjudged M.W. a delinquent on all four counts. On November 26, 2007, the juvenile court ordered M.W. to serve six months' probation and to pay \$772 restitution. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Hearsay

M.W. contends that the juvenile court improperly admitted hearsay evidence to prove the amount of damage to Oesterling's vehicle. We review a trial court's ruling on the

¹ Both are class A misdemeanors if committed by an adult. See Ind. Code §§ 35-42-2-1, 35-43-1-2.

² Both are class A misdemeanors if committed by an adult. See Ind. Code §§ 35-43-1-2, 35-45-2-1.

admissibility of evidence for an abuse of discretion. *Marcum v. State*, 772 N.E.2d 998, 1000 (Ind. Ct. App. 2002).

Reversal for the erroneous admission of hearsay evidence is appropriate where the evidence caused prejudice to the defendant's substantial rights. In determining whether error in the introduction of evidence affected the defendant's substantial rights, we must assess the probable impact of that evidence upon the [judgment]. The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction.

Hernandez v. State, 785 N.E.2d 294, 300 (Ind. Ct. App. 2003) (citations omitted), *trans. denied*.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Ind. Evidence Rule 801(c). Hearsay evidence is inadmissible except as provided by law or by the rules of evidence. Evid. R. 802.

Here, the juvenile court twice permitted the State to refresh Oesterling's recollection by showing him written damage estimates prepared by an out-of-court declarant. At the outset, we note that M.W. did not object to the State's usage of the second written estimate to refresh Oesterling's recollection regarding damages resulting from the June 15 incident; he therefore has waived the right to appeal its admissibility. *Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004).

We now address the first damage estimate. Despite M.W.'s hearsay objection, the juvenile court allowed the State to use the estimate to refresh Oesterling's recollection regarding the damage to his vehicle. Indiana Evidence Rule 612(a) provides: “If, while

testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." M.W. does not challenge the court's action of allowing Oesterling to look at it. Rather, he challenges the response it would elicit—one based on hearsay. Indiana Evidence Rule 803(5) provides that the following is not excluded by the hearsay rule:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

A witness's unaided testimony is preferred. *Marcum*, 772 N.E.2d at 1002. "If unaided testimony is not available, the law prefers refreshed recollection." *Id.*

M.W. challenges the use of the estimate because the witness, Oesterling, did not make it. Rather, an out-of-court declarant prepared it. Therefore, M.W. argues that Oesterling lacked personal knowledge regarding the amount of damage to his vehicle. "Whether the witness 'once had knowledge' about the matter should be measured by the standard of personal knowledge established by Rule 602." 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 803.105 (3d ed. 2007). Indiana Evidence Rule 602 provides in pertinent part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." As owner of the vehicle, Oesterling is deemed to have personal knowledge of its value. "A witness who has actual, personal knowledge of the very property in controversy, is competent to give his opinion as

to its value[.]” *Chicago & G.T. Ry. Co. v. Burden*, 14 Ind. App. 512, 512, 43 N.E.155, 155 (1896).

Here, Oesterling testified that M.W. had thrown the object that hit his vehicle. Although Oesterling could not recall the exact estimate of the damage attributable to M.W.’s act, he testified, “I know that I submitted it to your office and I could identify it if you have it.” Tr. at 10. This indicates Oesterling’s prior familiarity with the written estimate. The State used the estimate merely to refresh Oesterling’s recollection. The State sought neither to read it into evidence nor to offer it as an exhibit. After Oesterling looked at the estimate, he explained his confusion and delay in answering the initial question regarding the damage amount:

THE COURT: Sir, I just need a dollar figure.

[OESTERLING]: Okay. \$366.00, plus \$20.00. That was a delay. Because [the] estimate cost me \$20.00. And I wanted to get that in there. That’s why there was a delay.

Id. at 11. Based on the State’s limited use of the estimate as well as the record as a whole, we conclude that M.W.’s rights were not prejudiced, and the juvenile court acted within its discretion in allowing the State to use the estimate to refresh Oesterling’s recollection.

II. Intimidation

M.W. contends that the evidence was insufficient to support the juvenile court’s true finding that he committed intimidation. When reviewing a sufficiency challenge in a juvenile proceeding, we use the same standard as in a criminal proceeding. *H.J. v. State*, 746 N.E.2d 400, 402 (Ind. Ct. App. 2001). We neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence supporting the judgment and the reasonable

inferences to be drawn from it. *Bell v. State*, 881 N.E.2d 1080, 1085 (Ind. Ct. App. 2008), *trans. denied*. We must affirm if the probative evidence and its inferences could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Montgomery v. State*, 878 N.E.2d 262, 265 (Ind. Ct. App. 2007).

The juvenile court found that on June 15, 2007, M.W. committed intimidation. Indiana Code Section 35-45-2-1(a)(2) provides: “A person who communicates a threat to another person, with the intent ... that the other person be placed in fear of retaliation for a prior lawful act ... commits intimidation[.]” M.W. challenges the sufficiency of evidence to show that (1) he made a threat against Oesterling and (2) he intended to place Oesterling in fear of retaliation for a prior lawful act.

The record supports the juvenile court’s finding that M.W. threatened Oesterling. After testifying that M.W. and his companion cursed at him and flipped him off, Tr. at 12, Oesterling testified as follows:

[PROSECUTOR]: Okay. And during, on or about the 15th of July, (sic) of 2007, as he was throwing rocks at your, at your house, did he say anything to you? You said he was cursing you earlier, is that correct?

OESTERLING: Cursing and as in the first incident, *there was mention* about our house burning or something to that nature which really frightened us because there’s been so many in that neighborhood. I mean it scared us, you know, we’re in fear. Our house is a mobile home. It could ... If it, just a portion of it, caught on fire, I mean we, you know, my kids could die.

Id. at 13 (emphasis added). Oesterling further testified that he purchased three fire extinguishers as a result. *Id.*

M.W. essentially asks us to make a factual determination that M.W.’s companion, not

M.W., made the threat. The juvenile court observed the witnesses and was in a better position than we to interpret Oesterling's testimony. The evidence is sufficient to support a finding that M.W. threatened Oesterling.

We now address the issue of intent to retaliate for a prior lawful act. M.W. relies on *Casey v. State*, 676 N.E.2d 1069 (Ind. Ct. App. 1997), in which we interpreted this element of the intimidation statute. The *Casey* court determined that "the legislature intended to require the State to prove that the victim had engaged in a prior act, which was not contrary to the law, and that the defendant intended to repay the victim for the prior lawful act." *Id.* at 1072. In that case, the victim's prior lawful acts included merely "*being* a patron at a bar, *being* at her house and *being* a witness to Casey's attack on [her boyfriend]" *Id.* at 1073 (emphases added). The *Casey* court found the evidence insufficient to show that the victim's prior lawful acts resulted in any retaliatory motive when the defendant threatened her and her party guests at her house later that night.

Here, Oesterling's acts were more akin to those cited as sufficient in *Casey*. See *Hendrix v. State*, 615 N.E.2d 483 (Ind. Ct. App. 1993) (defendant's threats made to officer because officer had arrested him); see also *Johnson v. State*, 544 N.E.2d 164 (Ind. Ct. App. 1989) (defendant's threats to kill victim because she had filed criminal charges against him), *trans. denied*. On May 24, 2007, Oesterling called the police to report that M.W. had thrown a rock at his vehicle. As a result, police arrested M.W. on May 31, 2007. Based on this evidence, Oesterling's May 24 phone call could properly be deemed a prior lawful act for which M.W. retaliated by threatening to burn Oesterling's home.

III. Battery

M.W. asserts that his battery conviction must be overturned due to an alleged variance between the State's charging information and the evidence elicited at the delinquency hearing. If a variance misleads the defendant in the preparation of his defense or presents a risk of double jeopardy, it is material and the resulting conviction must be overturned. *Rust v. State*, 726 N.E.2d 337, 340 (Ind. Ct. App. 2000), *trans. denied*. M.W. did not object to the alleged variance, and at the end of the State's case, his Indiana Trial Rule 41(B) motion for a directed verdict did not specify variance as a basis. *See* Tr. at 33 ("We've heard no testimony that there was any touching of [C.O.], that occurred on May 24th, 2007.").

Here, the confusion arises from the fact that M.W.'s case involves two separate incidents between the same parties. The State clearly laid out the elements of battery in its charging documents; however, it listed the wrong date upon which the battery is alleged to have occurred. *See* Appellant's App. at 12 ("I.C. 35-42-2-1[:] On or about the 24th of May, 2007, said child did knowingly or intentionally, in a rude, insolent or angry manner touch [C.O.], which resulted in bodily injury.") The battery against C.O. stems from the June 15 incident, not the May 24 incident. However, we note that the parties agreed to consolidate the proceedings to include both incidents. *See* Tr. at 7. Thus, it was clear from the outset that the facts surrounding both incidents would be established by testimony from Oesterling and C.O.

Our review of the record indicates that although C.O., a minor, was confused about the dates of the two events, he could clearly recall the events as a nighttime event and a daytime event. After the prosecutor questioned C.O. about the nighttime rock-throwing/chase incident, the following interchange took place:

[PROSECUTOR]: Did [M.W.] touch you on that day or throw any rocks at you?

[C.O.]: Well like I said it was around midnight so no.

[PROSECUTOR]: Okay. Let[']s talk about the incident if we can, on June 15 of 2007. What were you doing that day?

[C.O.]: Well that, I think the story got switched. I think that was on that day. I think it was on that day. The, when the, that incident happened.

[PROSECUTOR]: What was on that day?

[C.O.]: The one that we just talked about [the nighttime rock-throwing/chase] was on June 15th.

[PROSECUTOR]: Okay. And so the incident on May 24th?

[C.O.]: Was when I was with my brother at home, baby-sitting him because my dad went to run a few errands. And when I saw [M.W.] walking down our road. He, he was with this other guy that wa... That was with him on the first incident and ...

[PROSECUTOR]: Okay. What happened after that?

[C.O.]: They started cussing at us and, and then they picked up a few rocks and started throwing them at us and I shut the garage door and told my brother to get inside. And then I called my dad and told him about everything.

[PROSECUTOR]: Okay.

[C.O.]: Then that's when he came home. When nothing happened. But he did hit me and threw rocks at my dad's car.

[PROSECUTOR]: When did he hit you?

[C.O.]: When he was throwing rocks with his friend. I know it was definitely [M.W.] because I saw him pick up a hand full of rocks and throw it at us.

[PROSECUTOR]: Okay. And do you remember about was this the incident that took place, do you remember the time of day?

[C.O.]: It was the middle of the afternoon.

[PROSECUTOR]: Okay. And where did that rock hit you?

[C.O.]: Well actually three rocks hit me when he, because he picked up a hand full. Hit me on the chest, in the stomach and in the leg.

Id. at 28-29. C.O.’s only lack of clarity concerned the dates, not the substance of the events.³ Moreover, the proffered defense hinged not upon the dates in question, such as would be the case when an alibi is offered; rather, it hinged upon whether M.W. was the actual rock-thrower. We therefore conclude that M.W. was not misled in the preparation of his defense. Accordingly, we find that the variance between the charging information and the evidence was immaterial.

IV. Criminal Mischief

M.W. next asserts that the evidence was insufficient to support the juvenile court’s true findings on both counts of criminal mischief. Indiana Code Section 35-43-1-2(a)(1)(A)(i) requires that the victim’s pecuniary loss must be at least \$250. To the extent that M.W.’s insufficiency claim rests upon the alleged inadmissibility of Oesterling’s written estimates, we have already decided that issue against him, *supra*. Regarding the June 15 incident, we note that prior to viewing the second written estimate Oesterling testified that he suffered “around \$300” in damages to his vehicle. Tr. at 14.

M.W. argues that the fact that the written estimates stemming from two separate

³ We also note that defense counsel made no attempt to clarify the confusion regarding the dates and may have added to the confusion by mistakenly referencing a third date. *See* Tr. at 32 (“[P.D. JOHNSON]: And the incident that happened on June 16th during the day time, there was also another kid there, correct?”).

incidents contained identical sums renders them inherently unbelievable. We reiterate that our standard of review prohibits us from reweighing evidence. *Bell*, 881 N.E.2d at 1085.

M.W. also contends that he was not the only participant in the rock-throwing incidents, and that, as such, the State failed to show which damages were attributable to the rocks he threw. Oesterling and C.O. provided eyewitness testimony that M.W. threw rocks at Oesterling's vehicle during both incidents. Again, M.W. invites us to reweigh evidence, which we may not do. The evidence was sufficient to establish that Oesterling suffered at least \$250 in pecuniary damages in each incident.

V. Restitution

Finally, M.W. contends that the juvenile court abused its discretion by ordering him to pay restitution as a condition of his probation. Indiana Code Section 31-37-19-5(b)(4) authorizes a juvenile court to order a child to pay restitution as part of a dispositional decree.

We review a juvenile court's restitution order for an abuse of discretion. *M.L. v. State*, 838 N.E.2d 525, 528 (Ind. Ct. App. 2006), *trans. denied*. "An abuse of discretion occurs when the trial court's determination is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom." *Id.* Where, as here, the juvenile court orders restitution as a condition of probation, it must inquire into the child's ability to pay. *Id.* at 529.

The juvenile court ordered M.W. to pay a total of \$772 in restitution, \$300 of which M.W. could earn through a restitution work program. M.W. challenges the remaining \$472 out-of-pocket restitution based on an inability to pay. M.W.'s father testified that he

personally did not have the money to pay his son's restitution. However, when the juvenile court asked if he thought his son could shovel snow to earn money, he responded, "I think he can shovel snow Yes I do." Tr. at 39. On appeal, M.W. asserts that the juvenile court should have made further inquiry, specifically taking into account issues like transportation to snow shoveling jobs as well as the availability of such jobs in his neighborhood. The juvenile court did not act unreasonably in relying on the father's opinion. In fact, the overall record indicates that the juvenile court demonstrated a great deal of sensitivity and regard for what was best for M.W. At the conclusion of the hearing, the juvenile court stated, "I will immediately note that if you do better in school, I will consider waiving most of the Court fees that you owe." *Id.* at 40-41. The juvenile court did not abuse its discretion in ordering M.W. to pay \$472 in out-of-pocket restitution.

Affirmed.

BARNES, J., and BRADFORD, J., concur.