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IN THE
COURT OF APPEALS OF INDIANA

CORDELL D. SMITH,)
)
Appellant-Defendant,)
)
vs.) No. 02A03-0803-CR-117
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0705-FD-385

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Cordell Smith appeals his conviction in a bench trial of possession of paraphernalia, as a class D felony.[1]

We affirm.

ISSUES

1. Whether the trial court erred in permitting the State to reopen its case.
2. Whether the evidence was sufficient to support Smith's conviction.

FACTS

On April 30, 2007, Fort Wayne Police Officer George Nicklow initiated a traffic stop of Smith's vehicle. Officer Nicklow "observed both the driver and the passenger continue to look around; look behind, at [his] squad car." (Tr. 6-7). Before Officer Nicklow could get out of his vehicle, "both driver and passenger exited their vehicle and began to walk away." (Tr. 7). Officer Nicklow got out of his vehicle and ordered Smith and his passenger to return, which they eventually did. Smith advised Officer Nicklow that his license was suspended. Officer Nicklow conducted a pat-down search of Smith but did not find any weapons.

As he was waiting for additional officers to arrive, Officer Nicklow noticed that Smith kept attempting to put his hands in his pockets. For his and the other officers' safety, he handcuffed Smith's hands behind his back and had Smith stand between the back of Smith's vehicle and the front of his police vehicle. As Officer Nicklow was

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[1] Ind. Code § 35-48-4-8.3.

determining whether Smith had any outstanding warrants, he observed Smith "place his left hand around his body into his front pants pocket, retrieve what looked like tissue paper balled up, then throw it on the ground and kick it underneath" Smith's vehicle. (Tr. 8). Officer Nicklow retrieved the tissue, which contained a glass pipe. The burnt residue and mesh wire inside the pipe indicated that it was the type "used for smoking crack cocaine." (Tr. 9).

Fort Wayne Police Officer Michael McEachern had also arrived at the scene of the traffic stop to offer assistance. While standing near Officer Nicklow's vehicle, he heard Officer Nicklow exclaim, "'Hey, I saw you drop that.'" (Tr. 17). He then looked at Smith and saw his "hand near his pocket . . . ." *Id.* He also observed Smith "kick a white wad of tissue paper underneath the vehicle . . . ." *Id.* After Officer Nicklow retrieved the tissue, Officer McEachern noted that it contained a small glass pipe.

On May 3, 2007, the State charged Smith with possession of paraphernalia, as a class D felony. The trial court held a bench trial on December 13, 2007. Both Officers Nicklow and McEachern testified at trial. Officer Nicklow testified that he observed Smith reach into his front pocket, remove an item from it, and drop the item. Officer McEachern testified that he observed Smith with his hands placed near his front pocket as he kicked an item underneath his vehicle.

During his closing statement, Smith's counsel stated that there was "no demonstration that a person with their hands handcuffed behind them . . . could even reach into the pocket . . . and be able to remove a wad and then kick it under the car." (Tr. 27). During its rebuttal, the State offered a demonstration. Smith did not object.

After Officer McEachern demonstrated that he could reach into his front pocket after having his hands handcuffed behind him, the trial court found Smith guilty as charged. The trial court sentenced Smith to two years.

DECISION

1. Reopening the State's Case

Smith asserts that the trial court improperly allowed the State to reopen its case in order to offer a demonstration. We disagree.

> A party should generally be afforded the opportunity to reopen its case to submit evidence that could have been part of its case in chief. Whether to grant a party's motion to reopen its case after having rested is a matter committed to the sound discretion of the trial judge. The factors that weigh in the exercise of discretion include whether there is prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request.

Saunders v. State, 807 N.E.2d 122, 126 (Ind. Ct. App. 2004) (citations omitted). "The opportunity for a party to reopen its case includes the chance to cure a claimed insufficiency of evidence." *Lewis v. State*, 406 N.E.2d 1226, 1230 (Ind. Ct. App. 1980).

During closing, Smith's counsel gave the following soliloquy:

> [T]he real interesting thing about this is that there's been no demonstration on the part of the State . . . that a person with their hands handcuffed behind them, . . . whether or not that person could even reach into the pocket . . . and be able to remove a wad and then kick it under the car. Seems to me that the State is required to show that he even had the opportunity to do this. . . . And so under those circumstances, I think the State has to show beyond a reasonable doubt that this was even possible, and I didn't hear any testimony that it was. There was no demonstration . . . . In fact, there were two officers here who could have testified by demonstration as to his movements or his alleged movements, and so under the circumstances . . .

> I'd ask that the Court find that the State failed to prove beyond a reasonable doubt . . . .

(Tr. 27-29).

On rebuttal, the State offered a demonstration. Smith did not object to the demonstration; in fact, it appears that Smith's counsel agreed to the demonstration, albeit suggesting that Smith demonstrate whether he could reach his front pocket.[2] The trial court allowed the State to reopen its case to give the demonstration.

We cannot say that there was prejudice to Smith where he invited a demonstration from the State and failed to object to a demonstration. *See Pinkton v. State*, 786 N.E.2d 796, 798 (Ind. Ct. App. 2003) ("It is well settled in Indiana that a party may not invite error, and later argue that such error supports reversal because error invited by the complaining party is not reversible error."); *Bald v. State*, 766 N.E.2d 1170, 1173 (Ind. 2002) (failure to object to a statement made during the State's closing argument results in waiver of the issue on appeal). We also cannot say that allowing the demonstration inconvenienced Smith or caused any confusion. Accordingly, we find no abuse of discretion.

2. Sufficiency of the Evidence

Smith asserts that the evidence was insufficient to support his conviction.

> 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

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[2] As Officer Nicklow began to handcuff Officer McEachern for the demonstration, Smith's counsel stated, "I was just going to say shouldn't we see it with him," presumably meaning Smith. (Tr. 30).

> 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).

The record reveals that Officer Nicklow observed Smith retrieve what appeared to be a wad of tissue paper from his front pocket, drop it, and then kick it underneath his vehicle. Officer McEachern saw "Smith's hand near his pocket and [he] saw him kick a white wad of tissue paper underneath the vehicle that he was standing in front of." (Tr. 17). When Officer Nicklow retrieved the wad of tissue paper, he discovered a glass pipe with burnt residue wrapped in the tissue paper. Furthermore, Officer McEachern demonstrated that a person could reach into his front pockets, even while handcuffed. We find the evidence is sufficient to sustain Smith's conviction.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.