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IN THE COURT OF APPEALS OF INDIANA

WILLIAM D. SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 73A04-0605-CR-276
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles D. O'Connor, Judge
Cause No. 73C01-0410-FB-014

December 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant William D. Smith appeals his convictions for Aggravated Battery,[1] a class B felony, and Auto Theft,[2] a class D felony. Specifically, Smith argues that the evidence was insufficient to support his convictions and that the trial court erred in denying his motion for a mistrial because the prosecutor committed misconduct during closing argument. Finding no error, we affirm the judgment of the trial court.

FACTS

In September 2004, Andrew Boucher was living with Bud Wells and Gale Hood at an apartment in Shelbyville. While Smith was at the apartment on September 24, 2004, he walked into a bedroom where several others were seated. At some point, Smith accused Boucher of stealing money from him. Boucher then overhead Smith tell one of the other individuals in the room that he was going to leave for a while and that if Boucher was still at the apartment when he returned, Smith would "mess him up." Tr. p. 22-23. Smith also told Wells that he was "pi**ed off" at Boucher and "wanted to beat the s**t out of him because he owed him money," and that he was going to "f**k [him] up." Id. at 25-26, 238.

Thereafter, Boucher told Smith that he would repay Smith the money he owed him, but Boucher denied taking any money from Smith that evening. Smith picked up a bar stool and held it over Boucher's head. The next thing Boucher remembered was that he was bleeding from the head.

Following the incident, Smith went to Amy Smith's (Amy) apartment where Wells was also present. The two noticed that Smith had "blood all over his hands," and Smith

[1] Ind. Code § 35-42-2-1.5.

stated that he "beat the s*** out of him." Id. at 240. Wells ran back to his apartment and saw blood everywhere. He observed that Boucher was holding a shirt to his head, and noticed that blood was "spraying out of" a wound on Boucher's head. Id. at 243.

Boucher went to the hospital where Dr. Laura Rife, the emergency room physician, observed that Boucher had a sizable laceration above his left eye that was causing him to bleed from two arteries. Smith also had a small cut and bruising above his right eye. The attending physicians determined that Smith's injuries were life threatening.

Detective James McCracken of the Shelbyville Police Department arrived at the hospital at 6:15 a.m. on September 25, 2004. Boucher appeared to be semi-conscious when Detective McCracken spoke with him. Boucher indicated that an individual named "Bill" had hit him in the head at Wells's apartment. Id. at 156-57. Boucher was then shown a photograph and identified Smith as his assailant. When the police officers entered Wells's apartment, they discovered blood in the living room, kitchen, and bathroom. Tr. p. 161. Additionally, blood spatter was on the wall in the living room next to the couch. Detective McCracken seized a cracked blood-covered barstool as evidence.

On September 22, 2004, Smith had asked Freda Burkhead if he could borrow her vehicle and drive to Georgia for the purpose of picking up his five-year-old son. Burkhead agreed to loan Smith her vehicle after he assured her that he would return the vehicle in a couple of days. Approximately one week later, Smith telephoned Burkhead and told her that he was in Louisiana. During that conversation, Burkhead asked Smith what had happened to

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[2] Ind. Code § 35-43-4-2.5.

Boucher, and Smith responded that Boucher "got what he deserved." Tr. p. 293. When Smith still had not returned the vehicle by October 21, 2004, Burkhead reported it stolen. Smith was subsequently apprehended and arrested in Tennessee.

Smith was subsequently charged with aggravated battery, auto theft, and a number of other offenses, including an allegation that he was a habitual offender. While Smith was incarcerated at the Shelby County Jail, he told his cellmate—John Schaf—that he had hit an individual in the head with a bar stool because that person had stolen some money from him. Smith also told Schaf that the individual had been lying on a couch and that blood had spattered on the wall.

At Smith's jury trial that commenced on December 6, 2005, his defense counsel made the following comments during closing argument: "What about all the other people?" "What about the ones that weren't in jail, that they choose not to bring over here." "Question, where are those people?" "We didn't hear from any of those people though. And they were somehow involved in this or may have been and the Prosecutor's Office is the one who gets to decide who they call as witnesses, not me." Tr. p. 393, 399, 407-08. The prosecutor commented in his rebuttal argument that Smith had not called any witnesses. At that point, Smith objected and moved for a mistrial. The trial court denied Smith's motion and instructed the jury as follows: "[T]here is no burden on the Defendant to present any evidence in this case, and to the extent that there was any implication in any of the State's remarks in that direction, um, those remarks are not to be considered by you." Tr. p. 421.

In the end, Smith was found guilty of aggravated battery and auto theft and was determined to be a habitual offender. Thereafter, Smith was sentenced to an aggregate term of twenty-four years of incarceration. He now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Smith argues that the evidence was insufficient to support his convictions for aggravated battery and auto theft. Specifically, Smith contends that the convictions cannot stand because "the State presented no evidence of an intentional or knowing battery . . . nor did the State present any evidence that Smith had exerted unauthorized control over [the victim's] vehicle." Appellant's Br. p. 9.

Our standard of review for claims challenging the sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the credibility of the witnesses, and we will respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124 (Ind. 2005). Considering only the evidence and the reasonable inferences supporting the verdict, our task is to decide whether there is substantial evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. Id. We also note that a criminal conviction may be based purely on circumstantial evidence. We will not disturb a verdict if the jury could reasonably infer that the defendant is guilty beyond a reasonable doubt from the circumstantial evidence presented. On appeal, the circumstantial evidence need not overcome every reasonable hypothesis of innocence. It is enough if an inference reasonably tending to support the

verdict can be drawn from the circumstantial evidence. Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995).

Our aggravated battery statute, Indiana Code section 35-42-1-5, provides:

> A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:
>
> (1) serious permanent disfigurement;
> (2) protracted loss or impairment of the function of a bodily member or organ; or
> (3) the loss of a fetus;
>
> commits aggravated battery, a Class B felony.

As noted above, the evidence established that Smith was angry at Boucher and "wanted to beat the s**t out of him because he owed him money." Tr. p. 238. Smith was alone in the living room with Boucher when the attack occurred. Id. at 24-28. The last thing that Boucher remembered before being injured was Smith holding a bar stool over Boucher's head and threatening to "f**k [him] up." Id. at 26.

Wells saw Smith covered with blood, and Smith told him that he "beat the s**t out of [Boucher]." Id. at 240. Smith also admitted to a cellmate at the Shelby County Jail that he had attacked Boucher. Id. at 318-19. Moreover, Boucher identified Smith as his assailant, and the hospital physicians determined that Bouchard's injuries were life threatening. Id. at 120, 159-60.

In light of this evidence, we reject Smith's contention that "the State simply failed to prove that [he] inflicted the injury in question." Appellant's Br. p. 11. Hence, we conclude that the evidence presented at trial was sufficient to support Smith's conviction for

aggravated battery.

Smith also contends that his conviction for auto theft must be set aside because the State failed to prove that he exerted unauthorized control over Burkhead's vehicle. Indiana Code section 35-43-4-2.5 provides that "[a] person who knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the owner of . . . the vehicle's value or use . . . commits auto theft, a Class D felony."

Notwithstanding Smith's claim, the evidence established that Burkhead allowed him to borrow her vehicle at the end of September 2004 only for a "couple of days." Tr. p. 292. However, Smith never returned the vehicle to Burkhead, and he was apprehended with her vehicle more than one month later. Id. at 202. In our view, this was sufficient to establish that Smith committed auto theft pursuant to Indiana Code section 35-43-4-2.5.

II. Mistrial—Prosecutorial Misconduct

Smith also contends that his convictions must be reversed because of prosecutorial misconduct. Specifically, Smith argues that he was entitled to a mistrial because the comments that the prosecutor made during closing argument improperly indicated to the jury that he had a duty to present evidence of his innocence.

In resolving this issue, we initially observe that to succeed on appeal from the denial of a mistrial, a defendant must demonstrate that the conduct complained of was both error and had a probable persuasive effect on the jury's decision. Booher v. State, 773 N.E.2d 814, 820 (Ind. 2002). The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. Id. A mistrial is an extreme remedy granted only when no other

method can rectify the situation. Id. Because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury, the trial court's determination whether to grant a mistrial is afforded great deference on appeal. Id. If the trial court properly admonishes the jury, any error is generally deemed cured. Wright v. State, 690 N.E.2d 1098, 1111 (Ind. 1997).

We also note that when reviewing an allegation of prosecutorial misconduct, this court makes two inquiries. First, we must determine whether the prosecutor engaged in misconduct. Hall v. State, 796 N.E.2d 388, 401 (Ind. Ct. App. 2003). When judging the propriety of a prosecutor's remarks, the statements at issue should be considered in the context of the argument as a whole. Seide v. State, 784 N.E.2d 974, 977 (Ind. Ct. App. 2003). Second, we must determine whether the alleged misconduct placed the defendant in a position of grave peril to which he should not have been subjected. Muex v. State, 800 N.E.2d 249, 251 (Ind. Ct. App. 2003). The "gravity of peril" is determined by analyzing the "probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct." Id.

When an allegation of misconduct arises, impropriety in closing arguments may be deemed "de minimis and cured by the preliminary and final instructions which advised the jury that the defendant was not required to present any evidence or to prove his innocence." Chubb v. State, 640 N.E.2d 44, 48 (Ind. 1994). Moreover, prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable. Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004). Indeed, a

statement that may be otherwise objectionable may be justified when it was invited or provoked by defense counsel. Lyda v. State, 395 N.E.2d 776, 779-80 (Ind. 1979).

As noted above, the prosecutor's remarks in this case were made during the rebuttal phase of closing arguments. Moreover, the prosecutor was replying to Smith's closing argument by pointing out the uncontradicted nature of the evidence. Hence, we cannot say that the prosecutor's response to Smith's statements in closing argument was impermissible. See Brown v. State, 746 N.E.2d 63, 70 (Ind. 2001) (holding that the prosecutor was entitled to respond to defense counsel's accusation in closing argument that the State had overlooked or even covered up evidence that could vindicate the defendant).

Even assuming solely for argument's sake that Smith did establish misconduct, he has failed to demonstrate that the prosecutor's statements placed him in grave peril. As discussed above, the uncontradicted evidence at trial showed that Smith: (1) threatened Boucher; (2) held a chair over Boucher's head while stating that he was "going to f**k [him] up;" (3) had blood on his hands after the incident; (4) admitted that he "beat the s**t out of [Boucher];" (5) fled the State in Burkhead's vehicle and kept it for over one month; (6) told Burkhead that Boucher "got what he deserved" and told Burkhead to keep her mouth shut; and (7) admitted to his cellmate that he had committed the battery. Tr. p. 25-26, 240, 293, 318-19. In light of this evidence, it was not probable that the prosecutor's comments had a persuasive effect on the jury. Thus, Smith has failed to satisfy the two-part test necessary to establish prosecutorial misconduct. Finally, as noted above, the trial court issued an admonishment to the jury indicating that a defendant has no burden to present any evidence in the case and that

any remarks implying that he did were not to be considered. Id. at 421. For all of these reasons, we conclude that the trial court properly denied Smith's motion for a mistrial.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.