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IN THE
COURT OF APPEALS OF INDIANA

ROBERT E. GINSBACH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0901-CR-3
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Robert L. Barnet, Jr., Judge
Cause No. 18C03-0804-CM-1

September 2, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Robert Ginsbach appeals his conviction for Invasion of Privacy,[1] a class A misdemeanor. Specifically, Ginsbach argues that his conviction violates Indiana's prohibition against double jeopardy. In addition, Ginsbach contends that the trial court abused its discretion by admitting several exhibits into evidence without a proper chain of custody. Finally, Ginsbach maintains that his trial counsel was ineffective. Finding no error, we affirm the judgment of the trial court.

FACTS

Ginsbach and L.M. were married and have one child together, M.G., who was born on October 31, 1989. Ginsbach and L.M. divorced sometime in 1992 or 1993, and L.M. was granted custody of M.G.

In 2005, L.M. sought a protective order against Ginsbach, preventing him from contacting her or anyone in her household, including M.G. The protective order was issued on September 8, 2005, and was effective for two years from that date.

On the morning of December 25, 2006, L.M. and M.G. were at their residence in Delaware County with their family. They had just finished opening Christmas presents when the doorbell rang. Nicholas Hamilton, M.G.'s fiance, opened the door and saw Ginsbach standing on the porch. Ginsbach immediately ran towards a Ford pickup truck sitting in the street. Hamilton was aware of the protective order and pursued Ginsbach on foot, but was unable to catch him. L.M. recognized Ginsbach, even though she only saw him from the back. L.M. stepped out on the front porch and watched Ginsbach drive away in the gray pickup truck.

[1] Ind. Code § 35-46-1-15.1.

Hamilton returned to the porch and as he and L.M. started to re-enter the house, they noticed packages and other items with M.G.'s name on them. M.G. opened the packages, which contained a doll, a picture frame, two letters addressed to M.G., and an envelope containing five photographs of Ginsbach.

The Delaware County Sheriff's Department was called and several deputies responded. The deputies noticed the items left on the porch, but did not take custody of them. Rather, L.M. retained them until trial.

On February 1, 2007, Ginsbach was charged with invasion of privacy, a class A misdemeanor. Following a jury trial on November 14, 2008, Ginsbach was found guilty as charged. On December 11, 2008, the trial court sentenced Ginsbach to 180 days imprisonment with all but ten days suspended and placed Ginsbach on formal probation for 180 days. Ginsbach now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Ginsbach argues that his conviction violates Indiana's prohibition against double jeopardy because he had already been found in civil contempt for violating the protective order and sentenced to 180 days, which was suspended.

Article I, section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." The Double Jeopardy Clause encompasses three separate but related prohibitions: "(1) a rule barring reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction; and (3) a rule barring multiple punishment for the same offense." Finney v.

State, 491 N.E.2d 1029, 1032 (Ind. Ct. App. 1986). Ginsbach's claim deals solely with the third prohibition against multiple punishments for the same offense.

The test for determining whether a sanction, other than a criminal sentence, constitutes a jeopardy is "whether the civil sanction constitutes a 'punishment.'" Bryant v. State, 660 N.E.2d 290, 295-96 (Ind. 1995) (quoting Mont. Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 780 (1994)). Thus, "[f]or the contempt sanction to constitute the first jeopardy in our double jeopardy analysis, the sanction must be punitive, not remedial or coercive in nature." Webster v. State, 673 N.E.2d 509, 512 (Ind. Ct. App. 1996).

In Webster, the defendant was charged with invasion of privacy for violating the restraining order that his ex-wife held against him. Id. at 510. Subsequently, the defendant was found to be in contempt for violating the restraining order. Id. at 510-11. The defendant was sentenced to ninety days in jail but the trial court stayed the sentence pending the defendant's continued compliance with the restraining order. Id. at 511.

The defendant filed a motion to dismiss the invasion of privacy charge, claiming that it constituted double jeopardy because he had already been punished for violating the restraining order by the contempt sanction. Id. The trial court denied the motion but certified the matter for interlocutory appeal to this court. Id.

A panel of this court held that the invasion of privacy charge did not constitute double jeopardy because the contempt sanction was coercive rather than punitive. Id. at 512. This court observed that the contempt sanction was stayed "in an effort to coerce [the defendant] into complying with the restraining order in the future." Id. We pointed out that "[h]ad the Contempt Court sought to make its contempt finding punitive, it

would have simply sentenced [the defendant] to a jail term without the conditional stay." Id.

Likewise, Ginsbach was sentenced to 180 days, which was suspended on the several conditions, including that "Ginsbach is to follow the terms and conditions of the Protection Order." Ex. p. 13. Consequently, the contempt sanction was an effort to coerce Ginsbach into complying with the protective order and his conviction for invasion of privacy did not place him in double jeopardy.

II. Chain of Custody

Ginsbach contends that the trial court improperly admitted the doll, the two letters, and the five photographs into evidence because the State failed to show a proper chain of custody. The admission or exclusion of evidence falls within the sound discretion of the trial court and we will review its decision only for an abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). We will not reverse the trial court's decision to admit evidence if the decision is supported by any legal basis apparent in the record. Lampitok v. State, 817 N.E.2d 630, 639 (Ind. Ct. App. 2004).

With respect to the chain of custody doctrine, "an adequate foundation is laid when the continuous whereabouts of an exhibit is shown from the time it came into the possession of the police." Cockrell v. State, 743 N.E.2d 799, 808 (Ind. Ct. App. 2001). In other words, chain of custody refers to the foundation that must be laid when the State has had possession of an exhibit. Here, neither the police nor prosecutors had possession of the exhibits because L.M. retained them at her residence until she brought them to the trial. Consequently, the chain of custody doctrine is not applicable in this case.

Nevertheless, our inquiry does not end here. An adequate foundation must be laid before an exhibit may be admitted into evidence. Johnson v. State, 446 N.E.2d 1307, 1309 (Ind. 1983). "To establish a proper foundation, for the admission of exhibits, there must be a 'reasonable probability that the exhibit is what it purports to be and that its condition is substantially unchanged as to any material feature.'" Cohen v. State, 714 N.E.2d 1168, 1174 (Ind. Ct. App. 1999) (quoting Newman v. State, 675 N.E.2d 1109, 1111 (Ind. Ct. App. 1996)). However, absolute proof of authenticity is not required, and a proper foundation is laid if the exhibit is relevant and a witness is able to identify it. Id.

In the instant case, L.M. testified that although she thought that the doll had been thrown away, she had recently found it in her garage. In addition, L.M. stated that the doll, the two letters, and the five photographs were the same ones that had been left on her porch on December 25, 2006. In light of this testimony, an adequate foundation was established for the admission of the exhibits, and this argument fails.

III. Ineffective Assistance of Counsel

Finally, Ginsbach contends that his trial counsel was ineffective for failing to file an Indiana Evidence Rule 404(B) notice so that he could introduce evidence that Hamilton, a witness for the State, had a pending criminal charge against him. In addition, Ginsbach argues that his trial counsel was ineffective for failing to call any witnesses at his sentencing hearing and that this failure resulted in the trial court finding no mitigating circumstances.

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State,

799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id.

Second, the defendant must show that the deficient performance resulted in prejudice. Id. Our Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

Here, when trial counsel attempted to introduce evidence of Hamilton's pending criminal charge, the State objected on grounds that counsel had not filed a notice as required by Evidence Rule 404(B). However, the trial court overruled the State's objection and allowed trial counsel to question Hamilton about his pending criminal case. Thus, Ginsbach is unable to establish prejudice as to this claim.

With regard to Ginsbach's claim that trial counsel was ineffective for failing to call any witnesses at the sentencing hearing, we note that Ginsbach fails to state who should have been called as a witness and what mitigating circumstances the testimony would have revealed. In addition, in light of Ginsbach's extensive criminal history, he has failed to persuade this court that his 180-day sentence "would have been much less severe," appellant's br. p. 13, had trial counsel called witnesses on Ginsbach's behalf. Indeed, Indiana Code section 35-50-3-2 provides that a person who is convicted of a class A misdemeanor may be sentenced for up to one year imprisonment. Consequently,

Ginsbach has also failed to establish prejudice on this claim, and we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.