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FILED
Dec 30 2010, 9:27 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY ADAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A04-1006-CR-405
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREEN CIRCUIT COURT
The Honorable Erik C. Allen, Judge
Cause No. 28C01-0907-FC-104

December 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jeffrey Adams (Adams), appeals his conviction for aiding in reckless homicide, a Class C felony, Ind. Code § 35-41-2-4; -42-1-5; criminal recklessness with a deadly weapon, a Class D felony, I.C. § 35-42-2-2(b)(1), (c)(2)(A); and reckless driving, a Class B misdemeanor, I.C. § 9-21-8-52(1).

We affirm.

ISSUES

Adams raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by excluding a witness' videotaped statement; and

(2) Whether the trial court abused its discretion by excluding the defense expert's final animation reconstruction of the vehicle crash as a sanction for untimely compliance with a discovery order.

FACTS AND PROCEDURAL HISTORY

On May 9, 2009, nineteen-year-old Preston Williams (Williams), together with his nineteen-year-old girlfriend, Jessica Allman (Allman), visited Adams, an acquaintance of theirs, in Greene County, Indiana. Williams, who had recently acquired a 1978 Camaro, intended to race thirty-seven-year-old Adams. At some point during the visit, Williams and Adams decided to race their cars and Williams filled his Camaro up with racing fuel before setting out. Allman rode with Williams and Adams' thirteen-year-old son rode with Adams.

Adams left first in his vehicle, followed by Williams. After turning onto State Road 43 and passing a stop sign, Adams rapidly accelerated, which led Williams to believe they had started to race and he took off in pursuit. In his attempt to pass Adams, Williams was speeding at between seventy-five to eighty miles per hour, whereas the posted speed limit was forty miles per hour. As Williams' car crested a hill on State Road 43, the car crashed into a motorcycle driven by Jerry Marker (Marker), who had been traveling north in the northbound lane of State Road 43. Marker was killed instantly. Williams' car rolled off the road and caught on fire, killing Allman and injuring Williams.

Because Adams' cell phone did not work, he dropped off his son and drove back to the crash scene. He returned ten minutes later and spoke privately to Williams before leaving again. Williams was questioned by the police at the place of the crash and at the hospital later that night; he immediately took responsibility for the accident. Several hours later, the police questioned Adams at his home about the deadly accident. Adams stated that he was only driving forty to fifty miles per hour.

On July 8, 2009, the State filed an Information charging Adams with Count I, aiding in reckless homicide with respect to Marker, a Class C felony, I.C. § 35-41-2-4; -42-1-5; Count II, aiding in reckless homicide with respect to Allman, a Class C felony, I.C. § 35-41-2-4; -42-1-5; Count III, criminal recklessness with a deadly weapon, a Class D felony, I.C. §35-42-2-2(b)(1), (c)(2)(A); Count IV, reckless driving, a Class B misdemeanor, I.C. § 9-21-8-52(1). On July 15, 2009, the trial court issued its discovery order, advising the parties that the failure of either party to provide the required discovery to the other party within fourteen

days prior to trial could result in the exclusion of that evidence. On March 24, 2010, the trial court scheduled the jury trial to take place on May 10, 2010. On May 7, 2010, three days before the jury trial, Adams filed his final supplemental response to discovery, which included a final version of the crash animation created by Adams' accident reconstruction expert witness, Nicholas Tumbas (Tumbas).

On the morning of trial, the State filed a motion to exclude the exhibits listed in Adams' May 7, 2010 supplemental discovery response. After conducting a hearing on the motion, the trial court granted the State's motion in part, denying the admission of the final version of the crash animation but allowing Tumbas to testify. On May 14, 2010, at the close of the evidence, the jury found Adams guilty on Count I, aiding in reckless homicide with respect to Marker, a Class C felony; Count III, criminal recklessness with a deadly weapon, a Class D felony; and Count IV, reckless driving, a Class B misdemeanor; the jury found Adams not guilty on Count II, aiding in reckless homicide with respect to Allman, a Class C felony. On June 9, 2010, during the sentencing hearing, the trial court merged Counts III and IV into Count I and sentenced Adams to six years imprisonment with two years suspended to probation on Count I.

Adams now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Exclusion of Impeachment Evidence*

Adams first contends that the trial court abused its discretion by excluding Williams' videotaped statement, which he had intended to use as evidence to impeach Williams with a

prior inconsistent statement pursuant to Indiana Rule of Evidence 613(b). Specifically, during trial, Williams testified that he did not remember ever having said that he and Adams were not racing. At that point, Adams requested the trial court to admit Williams' videotaped statement in which he clearly stated that he and Adams were not racing at the time of the crash. On the other hand, the State claims that Adams has waived review of this argument by inviting this perceived error. Alternatively, the State asserts that because Adams failed to make an offer of proof regarding Williams' prior videotaped statement, the trial court properly excluded it.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Payne v. State*, 854 N.E.2d 7, 17 (Ind. Ct. App. 2006) An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error if "the error is inconsistent with substantial prejudice or if a substantial right of the party is affected. *Id*.

Here, the trial court denied Adams' request to admit Williams' videotaped statements for impeachment purposes because the prior inconsistent statement "was not a sworn statement. Williams' statement was not marked as an exhibit and [Adams] did not make an offer of proof." (Appellant's App. p. 194). Following the State's case-in-chief, the trial court allowed Williams to review his videotaped statements during a recess and then offered Adams the opportunity to recall Williams and question him about these recorded statements for purposes of impeachment. The trial court specifically noted that "having examined the []

evidentiary rule further [] it may have been an erroneous decision to exclude the use of those recorded statements for purposes of impeachment and the [c]ourt would have given a limiting instruction as appropriate there for the use of those impeaching statements." (Transcript pp. 586-87). However, Adams declined to pursue any testimony, stating that he "[didn't] believe it is in [his] best interest to proceed with [Williams]." (Tr. p. 587).

A party may not first invite error and then later argue that the error supports reversal, because the error invited by the complaining party is not reversible error. *Berry v. State*, 574 N.E.2d 960, 963 (Ind. Ct. App. 1991), *reh'g denied, trans. denied*. Invited errors are not subject to appellate review. *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995), *reh'g denied*. Although Adams initially was denied the opportunity to impeach Williams, he was later afforded the possibility to do so; nevertheless, Adams declined. Therefore, Adams cannot now be heard to complain.

II. *Discovery Order*

Adams next contends that the trial court abused its discretion when it excluded Tumbas' final crash animation which was disclosed to the State three days prior to the commencement of the jury trial. A trial court has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant. *Lindsey v. State*, 877 N.E.2d 190, 195 (Ind. Ct. App. 2007), *trans. denied*. Where there has been a failure to comply with discovery procedures, the trial court is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be

eliminated or satisfactorily alleviated. *Id*. The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings, and will be granted deference in assessing what constitutes substantial compliance with discovery orders. *Id*. Absent clear error and resulting prejudice, the trial court's determinations as to violations and sanctions should not be overturned. *Id*.

Here, the trial court's discovery order advised the parties that the failure of either party to provide the required discovery to the other party within fourteen days prior to trial could result in the exclusion of that evidence. Our review of the record indicates that Adams initially disclosed his accident reconstruction expert, Tumbas, as a potential witness on September 29, 2009. On February 25, 2010, the State responded by providing Adams with the accident report from its accident reconstruction expert, Bruce Enz, and requested the trial court to compel Adams to disclose Tumbas' report. On the same day, the trial court granted the State's motion. On March 1, 2010, Adams, instead of providing the compelled discovery, filed a motion objecting to the State's motion and requested additional time to prepare and submit Tumbas' accident report. On March 24, 2010, the trial court scheduled the jury trial for May 10, 2010. Consequently, one month later, on April 23, 2010, the State filed a motion to exclude Tumbas as a witness because Adams had failed to disclose his report to the State. Only after the State filed this motion to exclude did Adams provide the State with an initial version of Tumbas' report, which consisted of written findings and a computer animation.

At noon on Friday, May 7, 2010, three days before the commencement of the jury trial, Adams disclosed Tumbas' final presentation, which included two new computer animations taken from different perspectives. On the morning of trial, the State moved to exclude these new proposed exhibits. The trial court held a lengthy in-trial hearing on the State's motion to exclude Tumbas as a witness and to exclude the late-filed exhibits. During this hearing, the State clarified that it did not object to Tumbas' testimony with respect to his report and animation submitted on April 23, 2010 but only objected to any presentation of the new animated evidence and report. The State elaborated that it "had already prepared [the] case, prepared [the] witnesses on the good faith that the animation that was given [] on April 23rd was what was going to be used at trial." (Tr. pp. 704-05). In response, Adams explained the reason for late filing was that Tumbas was merely "tweaking" his report. (Tr. p. 708). In a direct question from the trial court to Adams as to whether he "was sandbagging" the discovery of the final report, Adams responded "[n]o." (Tr. pp. 705-14). The trial court, indicating its frustration with this eleventh hour discovery, permitted Tumbas to testify, admitted his report and crash animation from April 23, 2010, allowed the two new animations, disclosed May 7, 2010, but only in so far as they coincided with the April animation and permitted the power point presentation prepared by Tumbas.

We have held before that Indiana jurisprudence recognizes a strong presumption to allow defense testimony, even of late-disclosed witnesses: "The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and irreparable prejudice would result to the State."

Vasquez v. State, 868 N.E.2d 473, 476 (Ind. Ct. App. 2007). In fashioning its order, the trial court provided a resolution for both parties: Tumbas was permitted to testify concerning his investigation and findings, as limited by the trial court. In addition, Tumbas was also allowed to explain the differences between the April and May animations. As such, Adams presented Tumbas' expert findings to the jury and it was within the jury's province to decide the weight of Tumbas' testimony. Therefore, mindful of the trial court's discretion in discovery matters, we conclude that Adams failed to demonstrate that the trial court's order with respect to the late discovery amounted to clear error or resulted in prejudice.

CONCLUSION

Based on the foregoing, we conclude that (1) Adams waived review of his claim that he was denied the opportunity to impeach Williams and (2) the trial court properly excluded the defense expert's final animation reconstruction of the vehicle crash, filed three days before the commencement of the jury trial.

Affirmed.

ROBB, J., and BROWN, J., concur.