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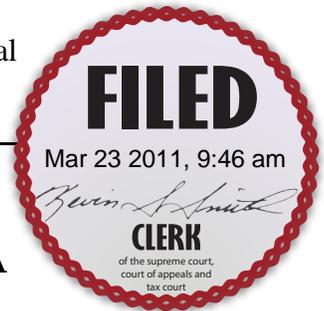
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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY LYNN VANSCYOC,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 18A02-1008-CR-915

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0808-FB-16

March 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Anthony Lynn Vanscyoc appeals his conviction for Aggravated Battery, a class B felony.¹ Vanscyoc raises the following arguments: (1) the trial court erred by permitting the State to use leading questions during the direct examination of one of its witnesses; (2) the trial court erred by admitting certain evidence; (3) there is insufficient evidence supporting the conviction; and (4) the twenty-year sentence is inappropriate in light of the nature of the offense and his character. Finding no reversible error, we affirm.

FACTS²

In the early morning of July 16, 2008, Vanscyoc and David Murphy were at April Weans's house, "hanging out" on the porch with Weans and Shawna Cooper. Tr. p. 44-45, 95, 97, 179. At some point, Jeffrey Minnick attempted to approach the house, but Vanscyoc and Murphy stopped him at the driveway and refused to allow him to proceed to the porch. A verbal altercation ensued between Minnick, Vanscyoc, and Murphy.

Minnick made contact with Vanscyoc's hand with a "push." Id. at 50, 57. He did not attempt to push or kick Vanscyoc. Then, Vanscyoc and Murphy attacked Minnick, following Minnick as he escaped to the street. Vanscyoc and Murphy knocked Minnick down, kicking and punching him while he was on the ground. When Vanscyoc and Murphy were finished, they drove away.

¹ Ind. Code § 35-42-2-1.5(2).

² We remind Vanscyoc's counsel that the statement of facts is to be presented in accordance with the standard of review appropriate to the judgment or order being appealed and "shall be in narrative form and shall not be a witness by witness summary of the testimony." Ind. Appellate Rule 46(A)(6)(c).

On August 21, 2008, the State charged Vanscyoc with class B felony aggravated battery and class D felony strangulation. The State voluntarily dismissed the strangulation charge on May 19, 2010. At the May 24, 2010, jury trial, Cooper, Weans, and Murphy all testified that they saw Vanscyoc strike Minnick. At the close of the trial, the jury found Vanscyoc guilty of class B felony aggravated battery. On July 22, 2010, the trial court sentenced Vanscyoc to twenty years, with five years suspended to probation. Vanscyoc now appeals.

DISCUSSION AND DECISION

I. Leading Questions

First, Vanscyoc argues that the trial court erred by permitting the State to ask leading questions of Minnick during direct examination. Vanscyoc, however, fails to direct our attention to the allegedly problematic questions or cite to specific portions of the transcript. Consequently, he has waived this issue for failing to make a cogent argument.

Waiver notwithstanding, we note that it is within the trial court's discretion to permit the use of leading questions during the direct examination of a witness, and we will review its decision for an abuse of that discretion. Bussey v. State, 536 N.E.2d 1027, 1029 (Ind. 1989). Indiana Evidence Rule 611(c) prohibits the use of leading questions "except as may be necessary to develop the witness's testimony."

Here, the State first established that Minnick has difficulty remembering the altercation as well as the events of the days following the incident. Tr. p. 71. Next, the following colloquy occurred:

Q. As a result from the attack that you suffered. Do you remember any injuries that you sustained?

A. Yes.

Q. What were those injuries?

A. Fractures to my left eye socket, broken nose, and just bruises and other things that I had.

Q. Did you have a concussion?

A. Yes.

Q. Busted lip?

A. Yes.

Q. Did you have bruises and abrasions to your face?

A. Yes.

Id. at 72. Defense counsel objected, and the trial court overruled the objection. We find that given Minnick's difficulty remembering the events of the altercation and the days thereafter, the State's leading questions were necessary to develop Minnick's testimony. And in any event, this testimony was cumulative of other evidence that established the injuries Minnick sustained as a result of the altercation. Consequently, we decline to reverse on this basis.

II. Admission of Evidence

Next, Vanscyoc argues that the trial court erred by admitting the following evidence: (1) Minnick's out-of-court statements to his mother following the attack; (2) the photo array and battery affidavit executed by Minnick following the altercation; and (3) testimony by a physician regarding Minnick's medical records. Admission of evidence is within the trial court's discretion, and we will reverse only upon an abuse of that discretion. Allen v. State, 813 N.E.2d 349, 360 (Ind. Ct. App. 2004).

A. Minnick's Out-of-Court Statements

First, Vanscyoc argues that the trial court erred by permitting Minnick's mother to testify regarding statements he made to her following the altercation. According to Vanscyoc, this testimony constituted inadmissible hearsay. 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. Evid. R. 801(c). Unless hearsay falls within an established hearsay exception, it is inadmissible. Evid. R. 802.

The record reveals that approximately six to eight hours after Minnick was attacked, his mother received a phone call about his injuries and went to the emergency room. She testified that Minnick was conscious, "hurting," and "mad and upset." Tr. p. 82. Over defense counsel's objection, she then testified as follows:

Q. Did he say what happened?

A. He said he went up to her house. There were two (2) guys sitting on the front porch. He said he went on in. He talked to a couple people. Talked to his friend that he was going to talk to, and then

when he came back out, and the next thing he knew he was down. Hit from behind and then beat up.

Q. Did he go into anymore detail about getting beat up?

A. I think I remember asking him, I said, who done [sic] it, did they hit you, kick you, you know. I was trying [to] figure out in my mind how this could have happened to him. He said he remembered being jumped by two (2) guys, and they were just all over him.

Id. at 84-85.

The trial court overruled Vanscyoc's objection, finding that although the testimony was hearsay, it was admissible pursuant to the excited utterance exception to the hearsay rule. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid. R. 803(2). Our Supreme Court has explained the rule as follows:

For a hearsay statement to be admitted as an excited utterance, three elements must be shown: (1) a startling event occurs; (2) a statement is made by a declarant while under the stress of excitement caused by the event; and (3) the statement relates to the event. Application of these criteria is not mechanical. Rather, under Rule 802, . . . the heart of the inquiry is whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. The statement must be trustworthy under the facts of the particular case. The trial court should focus on whether the statement was made while the declarant was under the influence of the excitement engendered by the startling event.

Yamobi v. State, 672 N.E.2d 1344, 1346 (Ind. 1996) (internal citations omitted).

Here, Vanscyoc argues that the excited utterance exception is inapplicable because the statements made by Minnick to his mother occurred six to eight hours after the

altercation. In other words, Vanscyoc contends that Minnick was not still under the stress of excitement caused by the event at the time he spoke with his mother.

Our Supreme Court has explained that

[w]hile a declaration is generally less likely to be admitted [as an excited utterance] if it is made long after the startling event, the amount of time that has passed is not dispositive. . . . [T]he central issue is whether the declarant was still under the stress of the excitement caused by the startling event when the statement was made.

Id. (internal citations omitted). Here, the record reveals that during the six to eight hours that elapsed between the attack and the time at which Minnick’s mother found him in the emergency room, he lost consciousness at least once. During that entire time, his eyes were swollen completely shut, his lips were grossly swollen, and he was covered in cuts and bruises. When his mother spoke to him upon her arrival, he was still “mad and upset.” Tr. p. 82.

Although six to eight hours was enough time for Minnick to conjure up a false story regarding the altercation, “[t]he question here . . . is whether [he] was capable of this reflection and deliberation.” Yamobi, 672 N.E.2d at 1347. The trial court could reasonably have concluded that Minnick was not. Being attacked—punched, kicked, and bitten with great force—is a traumatic event, both physically and psychologically. Its startling effect, depending on the severity of the injury, can continue for hours or longer. We find that given this record, the trial court did not abuse its discretion by concluding

that Minnick was still under the stress of the excitement caused by the attack when he spoke to his mother. In other words, it was not erroneous to admit this testimony.

Finally, we note that even if it had been error to admit the testimony, the error would have been harmless. There were three eye witnesses who testified about the altercation; consequently, the testimony of Minnick's mother regarding his description of the incident was cumulative. In any event, therefore, we decline to reverse on this basis.

B. Photo Array and Affidavit

Next, Vanscyoc contends that it was an abuse of discretion to admit the photo array on which Minnick identified Vanscyoc as his attacker and Minnick's battery affidavit into evidence. Specifically, he argues that these documents were hearsay that do not properly fall into the exception for a recorded recollection. Rule of Evidence 803(5) provides that a recorded recollection is not excluded by the hearsay rule:

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.

Initially, we observe that Vanscyoc did not object to the admission of the affidavit at trial and does not now claim that its admission constituted fundamental error. And as for the photo array, he objected to its admission at trial, but on a different ground than that which he raises on appeal—he argued that there was no evidence that Minnick once had knowledge of the incident. Under these circumstances, he has waived this issue on

appeal. See Collins v. State, 835 N.E.2d 1010, 1016 (Ind. Ct. App. 2005) (cautioning that “[a] party may not object on one ground at trial and raise a different ground on appeal”).

Waiver notwithstanding, we observe that Minnick testified that he no longer remembered the events of the attack. He did, however, remember the meeting with Officer David Porter during which the affidavit was created and executed. Minnick also testified regarding the writings he made on the affidavit, which establish that he once had knowledge of the incident. Officer Porter testified regarding the meeting with Minnick and the writings the officer made on the affidavit.

As for the photo array, as noted above, it was established that Minnick could no longer remember the events of the attack. The battery affidavit establishes that he once had knowledge of the attack. Officer George Hopper testified that he took a statement from Minnick on July 23, 2008, and on the same day, Minnick viewed the photo array created by Officer Hopper and identified his attacker. Officer Hopper testified that he saw Minnick complete the photo array and that Minnick appeared to understand the task he undertook.

For both the affidavit and the photo array, therefore, a proper foundation was laid for them to be read into evidence or shown to the jury pursuant to the recorded recollection exception to the hearsay rule. But the affidavit itself and the photo array were actually admitted into evidence, which runs contrary to Rule 803(5). As noted above, the rule provides that the memorandum or record may not itself be received into evidence as an exhibit unless offered by an adverse party. The State concedes as much,

but contends that the admission of these exhibits into evidence was harmless error. We agree. The State offered the testimony of three other eye witnesses who testified that Vanscyoc struck Minnick on the night in question. Consequently, this evidence was cumulative of other evidence in the record, and the admission of the actual documents into evidence as opposed to having them read into evidence was harmless error.

C. Medical Testimony

Next, Vanscyoc argues that the trial court erred by permitting Dr. Jan Kornilow to testify regarding Minnick's medical records. According to Vanscyoc, because Dr. Kornilow did not actually treat or examine Minnick following the attack, the doctor's testimony regarding the contents of Minnick's medical records was inadmissible because it was not the best evidence of Minnick's condition on the night of the attack and it was based on hearsay.

Dr. Kornilow testified as an expert witness, and Vanscyoc did not object to his credentials. His testimony was based upon his review of Minnick's medical records, which were admitted without objection. Evidence Rule 703, relating to expert testimony, states as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

In other words, an expert witness need not have personal knowledge to testify about his or her expert opinions. See Schmidt v. State, 816 N.E.2d 925, 937 (Ind. Ct. App. 2004)

(noting that an expert may base his opinion on (1) facts perceived by the expert, (2) facts made known to the expert at the hearing in which the testimony is offered, or (3) within limits, facts or data made known to the expert before the hearing, with no preference among these methods). Dr. Kornilow's testimony regarding the types of injuries Minnick suffered as a result of the attack was based on the medical records and observations made by the attending physician and nurses, which is an appropriate basis on which to form expert conclusions. We find that the trial court did not abuse its discretion by permitting Dr. Kornilow to testify in this regard.

III. Sufficiency of the Evidence

Vanscyoc argues that the evidence is insufficient to support his conviction for class B felony aggravated battery. In reviewing claims of insufficient evidence, we neither reweigh the evidence nor assess witness credibility, and will affirm unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000). To convict Vanscyoc of aggravated battery, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally inflicted injury on Minnick, causing protracted loss or impairment of a bodily member or organ, specifically, fractured nasal bones and a fractured eye socket with displaced fragments. I.C. § 35-24-2-1.5(2).

Here, it is undisputed that Minnick sustained serious injuries that qualify as a protracted loss or impairment of a bodily member or organ. Aside from that, the record reveals that Weans, Cooper, and Murphy all testified that they observed Vanscyoc strike

Minnick. Vanscyoc directs our attention to inconsistencies in their testimony and in other parts of the record, but those alleged inconsistencies were for the jury to evaluate. Vanscyoc's argument amounts to a request that we reweigh the evidence and assess witness credibility, which we may not do. We find that the evidence is sufficient to support Vanscyoc's conviction.

IV. Sentencing

Finally, Vanscyoc contends that the twenty-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character pursuant to Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Vanscyoc was convicted of a class B felony, meaning that the twenty-year term imposed by the trial court was the maximum possible sentence he faced. Ind. Code § 35-50-2-5 (providing that a class B felony conviction is eligible for a sentence of six to twenty years, with an advisory term of ten years imprisonment).

Initially, we note that Vanscyoc offers essentially no argument on this issue aside from a bare assertion that the sentence is inappropriate. Consequently, he has waived the argument.

Waiver notwithstanding, we note that as for the offense, Vanscyoc brutally beat Minnick, causing substantial, painful injuries to Minnick. As a result of the attack,

Minnick had to miss weeks of work, lost a portion of his memory, and had to return for follow-up treatment with multiple specialists.

As for Vanscyoc's character, as a juvenile, he was adjudicated a delinquent child for offenses that would have constituted possession of alcohol, consumption of alcohol by a minor, class C felony burglary, class B felony burglary, and two separate instances of trespass. As an adult, he has amassed convictions for class D felony criminal recklessness, class D felony receiving stolen property, five counts of class D felony theft, and class B misdemeanor criminal mischief.

Additionally, at the time Vanscyoc was sentenced herein, he was facing pending charges of class A misdemeanor battery resulting in bodily injury, class B misdemeanor disorderly conduct, three separate instances of misdemeanor driving while suspended, misdemeanor driving while under the influence of alcohol, class D felony domestic battery, class D felony strangulation, class A misdemeanor battery, class A misdemeanor invasion of privacy, class D felony causing serious bodily injury when operating a motor vehicle while intoxicated, class A misdemeanor criminal recklessness, and class C felony forgery, in seven different causes.

Vanscyoc committed a brutal offense herein, and came to the trial court with a history of juvenile and criminal activity that has essentially been unabated since he was thirteen years old. He has shown no respect for the rule of law or his fellow citizens, and we do not find the twenty-year sentence to be inappropriate in light of the nature of the offense and his character.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.