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**IN THE
COURT OF APPEALS OF INDIANA**

DALE MUNDY,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A02-0611-CR-1053

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Commissioner
Cause No. 49G03-0604-FB-075888

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Dale Mundy (“Mundy”) appeals his convictions and sentence for robbery as a Class B felony, robbery as a Class C felony, and criminal recklessness as a Class D felony. Mundy contends that the trial court abused its discretion by admitting into evidence the in-court identification of him, that insufficient evidence exists to support his conviction for robbery as a Class B felony, and that the court erred by imposing above-advisory consecutive sentences. Concluding that the State established an independent basis for Mundy’s in-court identification, that sufficient evidence exists to support his conviction for robbery as a Class B felony, and that the court did not err in sentencing him, we affirm the judgment of the trial court.

Facts and Procedural History

On April 16, 2006, Dustin Browers (“Browers”) and Tyler Blair (“Blair”), ages fifteen and sixteen, respectively, rode their bikes to go fishing near the conflux of the White River and Pleasant Run on the south side of Indianapolis. They parked their bikes just above a bridge on a path near to where they were fishing. Browers and Blair fished in two separate locations. Browers began fishing near the bridge closest to the location of their bikes, and Blair fished closer to the river away from the bridge. While fishing, two men grabbed their bikes. In the midst of taking their bikes, one of the men, later identified as Mundy, approached Browers, asked him if he knew how to fight, and then punched him in the face, causing his lip to bleed. In addition to taking their bikes, Mundy took Browers’ two fishing poles and Blair’s necklace. Mundy and the other perpetrator then fled the scene.

After the men left with Browers' and Blair's bikes, Browers' two fishing poles, and Blair's necklace, Browers and Blair walked home and called Browers' father, Richard Burchfield ("Burchfield"), to describe the incident to him. After learning of this incident, Burchfield, along with his oldest son, Richard Wayne Burchfield, Jr. ("Burchfield, Jr.") drove through a neighborhood adjacent to where the boys had been fishing and began searching for the two men. While driving through the neighborhood, they saw what appeared to be Browers' and Blair's bikes in front of one of the neighborhood homes. After pulling into the driveway, Burchfield approached the front of the home and began knocking on the front porch door. Nobody answered. While continuing to knock, Burchfield saw two fishing rods through a glassed-in porch that he recognized as the rods belonging to his son. Burchfield entered the porch, took the fishing rods, and began yelling through a screen window at a man he saw inside the home who had dreadlocks and tattoos lining his arms, later identified as Mundy. Mundy and Burchfield argued momentarily until Burchfield, concerned that another man in the house had a gun, retreated to his vehicle with the fishing poles and drove away. Mundy threw bricks at Burchfield and Burchfield, Jr. as Burchfield was retreating to his vehicle.

On April 27, 2006, the State charged Mundy with Count I: Robbery as a Class B felony,¹ Count II: Robbery as a Class C felony,² and Count III: Criminal Recklessness as a Class D felony.³ The State also alleged that Mundy was a habitual offender. Before

¹ Ind. Code § 35-42-5-1.

² I.C. § 35-42-5-1.

³ Ind. Code § 35-42-2-2.

trial, Detective Lloyd Walker (“Detective Walker”) conducted a pre-trial identification procedure by showing Browers, Blair, and Burchfield an array of six photographs for the purpose of identifying the perpetrators. Browers was unable to identify anyone from the photographs. Both Blair and Burchfield identified Mundy as one of the perpetrators. While showing Blair the photographs, Detective Walker commented that the photographs were two years old, the hairstyles of those photographed may have changed, and stated, “Let me see if I got the right ones in here. All right. See if you can recognize any of the guys here.” Tr. p. 146.

At trial, Blair identified Mundy three times as “that man right there,” *id.* at 127, 130, 134, and also accurately described Mundy’s court attire as “a green long-sleeved shirt with a red and white stripe - - I mean black and white stripe,” *id.* at 130. Mundy’s attorney acknowledged that his client was identified by Blair stating, “Judge, he’s identified him twice . . . [t]hat should be enough” *Id.* at 134. Although Mundy’s attorney acknowledged that Blair identified his client, he moved to suppress evidence of the in-court identification of Mundy on the basis that the photograph array provided to Blair by Detective Walker was unduly suggestive. The trial court overruled Mundy’s motion.

Additionally, Burchfield identified Mundy as the person he had confronted at the home where he recovered his son’s fishing poles, and Browers identified the fishing poles recovered by his father as the poles that Mundy took from him. Finally, both Browers and Blair testified that Mundy punched Browers before leaving the scene with the stolen items.

The jury found Mundy guilty of Counts I-III, and after he waived jury trial regarding his habitual offender status, the trial court found him to be a habitual offender. Finding Mundy's extensive criminal history to be an aggravator, the court imposed a fourteen-year sentence on the Class B felony robbery conviction and enhanced this sentence by an additional ten years for the habitual offender finding with four years suspended; a six-year sentence on the Class C felony robbery conviction with two years suspended; and a three year sentence on the Class D felony criminal recklessness conviction with two years suspended. The court ordered all the sentences to be served consecutively for a total executed sentence of twenty-five years. Mundy now appeals.

Discussion and Decision

Mundy raises the following three issues on appeal: (1) whether the trial court abused its discretion by admitting the in-court identification of Mundy; (2) whether the evidence is sufficient to support his conviction for robbery as a Class B felony; and (3) whether the trial court erred in sentencing him.

I. Admission into Evidence of Blair's In-Court Identification of Mundy

Mundy argues that the trial court abused its discretion in admitting Blair's in-court identification of him. The admission or exclusion of evidence is within the trial court's discretion. *Newman v. State*, 751 N.E.2d 265, 270 (Ind. Ct. App. 2001), *trans. denied*. We therefore review the trial court's evidentiary rulings for abuse of that discretion. *Id.* "When a trial court makes a decision that is clearly against the logic and effect of the facts and circumstances before the court, the decision involves an abuse of discretion." *Id.*

Mundy contends that Blair's in-court identification was invalid because it was tainted by the use of an unduly suggestive pre-trial identification procedure. A pre-trial identification procedure is unduly suggestive "if it raises a substantial likelihood of misidentification given the totality of the circumstances." *Swigart v. State*, 749 N.E.2d 540, 544 (Ind. 2001). Here, Mundy contends that the photo array was unduly suggestive because, before showing the array to Blair, Detective Walker informed him that the photographs were a couple of years old, that the hairstyles of those photographed might have changed, and stated, "Let me see if I got the right ones in here. All right. See if you can recognize any of the guys here." Tr. p. 146.

Even if we assume that the pre-trial identification procedure was unduly suggestive, "a witness who participates in an improper pre-trial identification procedure may still identify a defendant in court if the totality of the circumstances shows clearly and convincingly that the witness has an independent basis for the in-court identification." *Swigart*, 749 N.E.2d at 544.⁴ On this point, Mundy argues that Blair did not have an independent basis for the in-court identification. We disagree.

To determine whether a witness had an independent basis for an in-court identification of a defendant, the following factors are considered:

The amount of time the witness was in the presence of the defendant; the distance between the two; the lighting conditions; the witness' degree of attention to the defendant; the witness' capacity for observation; the

⁴ Mundy also argues that the court improperly admitted the pre-trial identification into evidence. He fails to develop this argument in this regard, choosing to focus his efforts on arguing that the in-court identification was inadmissible due to the tainted out-of-court identification. As such, he has waived the issue. *See* Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, we agree with the State that Detective Walker's comments that he had "the right ones in here" was not a statement that Mundy's photo was in the array as much as it was a statement that the detective included the photos he intended to include in the array.

witness' opportunity to perceive particular characteristics of the perpetrator; the accuracy of any prior description of the perpetrator by the witness; the witness' level of certainty at the pretrial identification; and the length of time between the crime and the identification.

Id.

Here, the crimes occurred while it was light outside and Blair testified that Mundy was "right in front of me" and "not even two feet away from me" when Mundy demanded that Blair give him his necklace. Tr. p. 130. Mundy remained less than two feet away from Blair long enough for Blair to remove his necklace and give it to Mundy. Additionally, Blair remembered Mundy's appearance and accurately described him as having dreadlocks and numerous tattoos all over his arms. Furthermore, while testifying in court, Blair was clear in his identification of Mundy as evidenced by his three in-court identifications of Mundy. We find that the totality of the circumstances shows clearly and convincingly that Blair had an independent basis for his in-court identification of Mundy.

Furthermore, even if the admission of Blair's in-court identification of Mundy was erroneous, this error was harmless in light of the substantial corroborating evidence that was presented at trial. Most notably, Burchfield identified Mundy from a photograph array, without objection, and also identified Mundy in court as the person he confronted at the home where he recovered his son's fishing poles. Additionally, Browers and Burchfield remembered Mundy's appearance and accurately described him as having dreadlocks and numerous tattoos all over his arms. Browers also identified the fishing poles recovered by his father as the poles that Mundy took from him. The trial court did not abuse its discretion by admitting Blair's in-court identification of Mundy.

II. Sufficiency of the Evidence

Mundy also claims that the evidence presented at trial is insufficient to support his conviction for robbery as a Class B felony. “Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects the jury’s exclusive province to weigh conflicting evidence.” *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (internal quotations omitted). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

In order to prove that Mundy committed robbery as a Class B felony, the State was required to show that Mundy knowingly or intentionally took property from Browers by putting him in fear or by using or threatening the use of force, which resulted in bodily injury, that is, a lacerated lip. *See* Appellant’s App. p. 23; *see also* Ind. Code § 35-42-5-1. Mundy argues that the State failed to do this because “the taking of the bikes and fishing poles had occurred before Mr. Mundy challenged the alleged victim to fight and then punched him in the mouth. Because the asportation of the property had already occurred and because there was no connection between the use of force and the taking, there can be no showing of Robbery.” Appellant’s Br. p. 11. In other words, Mundy does not deny the theft of Browers’ property or the force used to take the property. Rather, he argues that the force used “was not to complete the taking

or assist in escape; it was a purposeless, although mean-spirited, assault on his person,” not robbery. *Id.* at 15. We cannot agree.

“A robbery is not complete until the defendant ‘asports’ the property, or takes it from the possession of the victim.” *Young v. State*, 725 N.E.2d 78, 81 (Ind. 2000). “Asportation continues as the perpetrators depart from the place where the property was seized.” *Id.* Moreover, “It is not until the property is successfully removed from the premises or person’s presence that the robbery is complete.” *Cooper v. State*, 656 N.E.2d 888, 889 (Ind. Ct. App. 1995). Here, both Browers and Blair testified that Mundy punched Browers before fleeing the scene with the stolen items. Based on this evidence, the jury reasonably concluded that Mundy took Browers’ property by the use of force resulting in bodily injury. There is sufficient evidence to support Mundy’s conviction for robbery as a Class B felony.

III. Sentencing

Finally, Mundy argues that the trial court erred in sentencing him. He directs us to Indiana Code § 35-50-2-1.3(c)(1), which provides, in pertinent part, “In imposing consecutive sentences in accordance with IC 35-50-1-2, a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term.” (Formatting altered). Mundy contends that Indiana Code § 35-50-2-1.3(c)(1) required the trial court, in ordering consecutive sentences, to impose the advisory sentence of ten years for robbery as a Class B felony, the advisory sentence of four years for robbery as a Class C felony, and the advisory sentence of one and one-half years for criminal recklessness as a Class D felony. Mundy relies upon *Robertson v. State*, 860

N.E.2d 621, 625 (Ind. Ct. App. 2007), *opinion vacated*, 871 N.E.2d 280 (Ind. 2007), where a panel of this Court held that Indiana Code § 35-50-2-1.3(c)(1) prohibits a trial court from “deviat[ing] from the advisory sentence for any sentence running consecutively.” However, after Mundy filed his brief, our Supreme Court granted transfer in *Robertson*, thereby vacating this Court’s opinion, and on August 8, 2007, reversed our decision, holding instead that “under the sentencing laws from April 25, 2005, a court imposing a sentence to run consecutively to another sentence is not limited to the advisory sentence. Rather, the court may impose any sentence within the applicable range.” *Robertson v. State*, 871 N.E.2d 280, 281-82 (Ind. 2007). In light of our Supreme Court’s holding in *Robertson*, the trial court did not err in imposing above-advisory consecutive sentences for Mundy’s two robbery convictions and his criminal recklessness conviction.

Affirmed.

ROBB, J., and BRADFORD, J., concur.