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IN THE COURT OF APPEALS OF INDIANA

HENRY LLOYD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0610-CR-584
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Magistrate
Cause No. 49G01-0512-FB-212608

September 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

A jury convicted Henry Lloyd of attempted robbery,[1] a Class B felony, and, thereafter, the trial court adjudged him an habitual offender.[2] Lloyd appeals his conviction and sentence, raising the following two restated issues:

I. Whether the trial court abused its discretion when it denied his motion for a mistrial after a State's witness testified that she had told a deputy about "other things" that Lloyd had done in another county.

II. Whether Lloyd's enhanced sentence contravened IC 35-50-2-1.3.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of November 11, 2005, Joseph Giesting and Samuel Slevin were volunteering at their Indianapolis church's weekly BINGO event. When the games were over, Giesting and Slevin left the building that housed the school cafeteria, where the games were played, and were walking to the neighboring church office to make the deposit when Lloyd suddenly grabbed Giesting's shoulder, threw a cup of gasoline in his face, and said, "Give me the money." *Tr*. at 74-75, 93-94. Lloyd then turned to Slevin and knocked him in the head and face with a metal object. Giesting got up and pursued Lloyd and wrestled him to the ground. Lloyd was wearing a mask, and Giesting was able to pull it up somewhat, but was not able to completely reveal Lloyd's face. Lloyd attempted to set Giesting, who had gasoline on his face and clothes, on fire with his Bic lighter. Eventually, Lloyd fled on foot without the BINGO money. Slevin called 911, and police arrived in a matter of minutes. Police retrieved at the scene a plastic cup that smelled of gasoline and a bag that Lloyd had

[1] *See* IC 35-42-5-1; IC 35-41-5-1.

dropped during the scuffle. The media also reported to the scene, and the story later appeared on Crime Stoppers.

Approximately one month after the incident, in December 2005, Lloyd's wife, Cathy Lloyd ("Cathy"), was working at McDonald's in Greenwood, Indiana. After noticing a Johnson County Sheriff's vehicle in the drive-thru lane, Cathy sought and obtained permission from her manager to take a break in order to speak to the deputy. She told the Johnson County deputy about the events that had occurred on November 11. The deputy immediately contacted the Speedway Police Department and relayed the information. Speedway Police Department Sergeant Dierdorff arrived at the McDonald's restaurant, transported Cathy to the Johnson County government center, and took her statement. Cathy reported to Sergeant Dierdorff that on November 11, Lloyd had awakened her about 9:00 or 9:30 p.m., told her to get up, and come with him. He also instructed her to bring a sack with her, so she brought the bag she regularly used when she played weekly BINGO. He told her that he intended to rob St. Christopher's of its BINGO proceeds that night. Cathy reported that Lloyd drove them to a location near St. Christopher's, parked the van, and left. When he returned, he was angry and cussing. Cathy told Sergeant Dierdorff that she was frightened of Lloyd and intended to leave him, and she asked for police protection. Authorities transported Cathy to the Speedway Police Department and then to a women's shelter.

Later that night, when Lloyd came to McDonald's to pick up Cathy from work, Speedway police arrested him. The State charged Lloyd with attempted robbery, a Class B felony. Subsequently, the State charged Lloyd with being an habitual offender.

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[2] *See* IC 35-50-2-8.

At the September 2006 jury trial, Cathy testified to her involvement in and knowledge of the November 11 crime. When the State questioned her about what she told the Johnson County deputy at the McDonald's in December 2005, Cathy initially replied, "I told the deputy of a couple of things that [Lloyd] had done in Johnson County." *Tr*. at 134. The prosecutor responded, "Let's not talk about that. What else did you tell him?" *Id*. at 134-35. Cathy then stated "I told him a few things about what happened on November 11th." *Id*. at 135. Because of Cathy's mention of "things" Lloyd had done in Johnson County, Lloyd moved for a mistrial on the basis that other acts committed at another time were the subject of a motion in limine and were not admissible pursuant to Ind. Evid. Rule 404(b) and Evid. R. 609. The trial court denied the motion. Lloyd then moved to strike Cathy's statement and asked that the jury be admonished not to consider it. The trial court granted Lloyd's motion and admonished the jury as requested.

The jury convicted Lloyd of attempted robbery, as charged. Lloyd waived his right to a jury trial on the habitual offender charge, and, after a bench trial, the trial court adjudicated him to be an habitual offender. At the time that Lloyd committed the attempted robbery, he was on parole for a 1994 Class B felony burglary conviction. The trial court sentenced Lloyd to fifteen years for the attempted robbery conviction, which it enhanced by twenty years for the habitual offender determination. Lloyd now appeals.

DISCUSSION AND DECISION

I. Motion for Mistrial

Lloyd first argues that the trial court abused its discretion when it denied his motion for a mistrial. Whether to grant or deny a motion for mistrial is a decision left to the

discretion of the trial court. *Williams v. State*, 755 N.E.2d 1128, 1132 (Ind. Ct. App. 2001), *trans. denied*. We afford the trial court this deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Id*. A mistrial is an extreme remedy that should be invoked only when no other measure can rectify the situation. *Id*.

When the trial court has admonished the jury to disregard a statement made during the proceedings, reversible error is seldom found because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement. *Lehman v. State*, 777 N.E.2d 69, 71-72 (Ind. Ct. App. 2002). The question of whether a defendant was so prejudiced that the admonishment could not cure the error is one that must be determined by examining the facts of the particular case. *Williams*, 755 N.E.2d at 1132. The burden is on the defendant to show that he was harmed and placed in grave peril by the denial of the mistrial motion. *Id*.

Lloyd alleges that Cathy's testimony regarding her statement to the Johnson County deputy that Lloyd had done other "things" in Johnson County was an evidentiary harpoon. *Tr*. at 134. An evidentiary harpoon generally occurs when the prosecution injects inadmissible evidence that prejudices the jury against the defendant and his defense. *Ramsey v. State*, 853 N.E.2d 491, 499 (Ind. Ct. App. 2006), *trans. denied*. In certain circumstances, the injection of an evidentiary harpoon by a prosecutor may constitute prosecutorial misconduct rising to the level of fundamental error and requiring a mistrial. *Id*.

At trial, Lloyd moved for a mistrial after Cathy's statement, arguing that her statement violated the existing order on his Ind. Evid. Rule 404(b) motion in limine to exclude evidence

of other crimes, wrongs, or acts. Lloyd claims that the trial court abused its discretion when it denied his motion. To prevail on appeal from the denial of his motion for mistrial, Lloyd must establish that the questioned conduct "was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected." *Williams*, 755 N.E.2d at 1132. Lloyd has not met this burden.

Here, Cathy's statement was brief and merely referenced "things" that Lloyd "had done" in Johnson County. *Tr*. at 134. Taken literally, the statement was benign, as it did not identify anything that Lloyd had allegedly done. In fact, as the trial court observed,

> She never said it was criminal, just she told - - told him about some of the things in Johnson County. You know, that could have been the fact that he ran over the lawn at McDonald's, you know. It could have been anything that wasn't criminal. It could have been anything. So that's not prejudicial to the jury.

Id. at 136. We agree. At most, the jury may have inferred that Lloyd engaged in some sort of criminal activity, but, even if it did, the court immediately struck the statement and expressly admonished the jury not to consider it. We presume that remedy cured any error that may have occurred because of Cathy's statement. *See Ramsey*, 853 N.E.2d at 499 (trial court's admonishment is presumed to correct any error); *Lehman*, 777 N.E.2d at 71-72 (timely admonition presumed to sufficiently protect defendant's rights and remove any error). Lloyd has not established that Cathy's statement was so prejudicial and inflammatory that he was placed in a position of grave peril, which was not cured by the court's admonition to the jury. We find no trial court error in denying his motion for mistrial.

II. Sentencing

Lloyd challenges his sentence, arguing the fifteen-year sentence for attempted robbery, enhanced by twenty years for the habitual offender determination, violated IC 35-50-2-1.3. We must thus consider the legality of Lloyd's sentence. *See Reffett v. State*, 844 N.E.2d 1072, 1073 (Ind. Ct. App. 2006) (sentence that is contrary to or violative of penalty mandated by statute is illegal in that it is without statutory authorization). Lloyd contends that IC 35-50-2-1.3, the advisory sentencing statute, requires that his combined thirty-five-year sentence (fifteen years for the attempted robbery conviction and twenty years enhancement for the habitual offender finding) be reduced to a twenty-year term, comprised of the ten-year advisory sentence for attempted robbery and a ten-year enhancement for the habitual determination.

We first address the matter of the fifteen-year sentence imposed for Lloyd's attempted robbery conviction. When Lloyd committed the present Class B felony attempted robbery, he was on parole for a 1994 Class B felony burglary, and, pursuant to IC 35-50-1-2(d),[3] his current attempted robbery sentence was required to run consecutively to the prior burglary sentence. Lloyd's argument is that pursuant to IC 35-50-2-1.3(c) the trial court was required

[3] IC 35-50-1-2(d) states,

> If, after being arrested for one (1) crime, a person commits another crime:
>
> (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
>
> (2) while the person is released:
> (A) upon the person's own recognizance; or
> (B) on bond;
>
> the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

to impose only the advisory ten-year sentence for the Class B felony attempted robbery conviction because he was required to serve it consecutively to the burglary sentence. In light of recent precedent, we reject Lloyd's claim.

Our Supreme Court in *Robertson v. State*, 871 N.E.2d 280, 285 (Ind. 2007), recently rejected such a claim and held that IC 35-50-2-1.3(c) does not impose the requirement that any and every consecutive sentence be for the advisory term. Rather, the Court explained, subsection 1.3(b) states the more general proposition that "a court is not required to use an advisory sentence," except as required by subsection 1.3(c). Subsection 1.3(c) then proceeds to "carve[] out" three exceptions which *do require* advisory sentences. *Id*. Those are: (1) when imposing consecutive sentences for nonviolent felony convictions arising out of a single episode of criminal conduct in accordance with IC 35-50-1-2; (2) when imposing an additional fixed term to an habitual offender under IC 35-50-2-8; and (3) when imposing an additional fixed term to a repeat sexual offender under IC 35-50-2-14. *Id*.

After listing those three circumstances in which advisory sentencing is required, subsection 1.3(c) then states, "However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense." *Robertson* explained that this reference to "underlying offense" is meaningful only to the repeat offender sentencing enhancements of subsections (c)(2) and (c)(3). *Id*. at 286. Thus, as applied to this case, the "underlying offense" to Lloyd's habitual offender enhancement is the attempted robbery conviction, and according to the statute's terms, the trial court was "not required to use the advisory sentence in imposing the sentence for [the attempted robbery]." IC 35-50-2-1.3(c). For these reasons, the trial court did not violate IC 35-50-2-1.3 when it imposed the fifteen-year sentence.

We now turn to Lloyd's twenty-year habitual offender enhancement.[4] Lloyd argues that, pursuant to IC 35-50-2-1.3(c), the trial court was limited to imposing a ten-year "additional fixed term" for the habitual offender finding because subsection 1.3(c) requires the trial court "to use the appropriate advisory sentence in imposing . . . an additional fixed term." His position is that the "appropriate advisory sentence" is the same as the advisory sentence for the Class B felony attempted robbery conviction, namely ten years. Upon careful review of the relevant statutes, we disagree.

IC 35-50-2-1.3(c) states that in imposing "an additional fixed term" to an habitual offender under IC 35-50-2-8, a court is required to use the appropriate advisory sentence. IC 35-50-2-8(h) identifies a range for what constitutes "an additional fixed term." It states:

> The court shall sentence a person found to be a habitual offender to *an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense*. However, the additional sentence may not exceed thirty (30) years. (Emphasis added.)

If a trial court was to be limited to the advisory sentence in imposing "an additional fixed term," this provision would be rendered meaningless. The plain and unambiguous language of IC 35-50-2-8(h) gives the trial court the discretion to set the "additional fixed term" for an habitual offender enhancement. No construction of the statute is required. We note, however, what appears at first to be an inherent conflict between this specific habitual offender statute, which provides a range for calculating the "additional fixed term," and IC 35-50-2-1.3(c), which states that a trial court is required to use "the appropriate advisory

[4] We note that an habitual offender adjudication is not a separate offense. *Moore v. State*, 769 N.E.2d 1141, 1145-46 (Ind. Ct. App. 2002). The sentence imposed on an habitual offender determination is an

sentence in imposing . . . an additional fixed term." We find that our Supreme Court effectively resolved the conflict when it concluded in *Robertson* that "subsection 1.3(c) did no more than retain the fixed maximum sentences permissible under the . . . repeat offender provisions."[5] *Robertson*, 871 N.E.2d at 285.

Here, the trial court's twenty-year sentence was twice the advisory sentence for attempted robbery and was well within the parameters of IC 35-50-2-8(h). We find no error in Lloyd's twenty-year habitual offender enhancement.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.

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enhancement to the sentence on the underlying offense, not a separate consecutive sentence. *Id*.

[5] We note that Indiana's repeat sexual offender statute, IC 35-50-2-14(e), states that a repeat sexual offender may be sentenced "to an additional fixed term *that is the advisory sentence* for the underlying offense." (Emphasis added.) Thus, unlike the habitual offender statute that gives a range for the "additional fixed term," the repeat sexual offender statute requires that the "additional fixed term" must be equal to the advisory sentence for the underlying offense.