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**IN THE
COURT OF APPEALS OF INDIANA**

DYWAN TRELANE MASTERSON,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 02A03-0703-CR-132

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0602-FB-29

October 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dywan T. Masterson appeals his conviction for unlawful possession of a firearm by a serious violent felon, a class B felony.¹

We affirm.

ISSUE

Whether the trial court erred in admitting evidence.

FACTS

During the early morning of February 18, 2006, Fort Wayne Police Department Detective Delonzo Myles was conducting a sobriety checkpoint in a fully marked police vehicle. Detective Myles was “parked on Saint Crow [sic], . . . facing Hobson, watching southbound and northbound traffic,” when he observed “a little black Mustang-type vehicle come speeding down the street, weaving in and out of traffic, causing other cars to pull over to the right and stop.” (Tr. 115, 114). The vehicle “kept going until [it] hit Coliseum.” (Tr. 114).

Detective Myles began following the vehicle and activated his emergency lights and siren. Once Detective Myles got behind the vehicle, he observed that it was a black Mustang. Detective Myles also observed two people in the Mustang and noticed that the driver was wearing a light brown or tan hat.

¹ Ind. Code § 35-47-4-5.

As Detective Myles pulled up behind the Mustang, it “took off at a high rate of speed,” traveling south on Hobson. (Tr. 116). Detective Myles began pursuing the Mustang but was unable to catch up with the Mustang, which he estimated to be traveling at “anywhere from eighty to a hundred miles per hour.” (Tr. 118). Ultimately, the Mustang crashed.

When Detective Myles approached the Mustang, “both doors were open,” and neither occupant was in the Mustang. (Tr. 120). Detective Myles observed “a Ruger Super Hawk .44 Magnum,” (Tr. 121); a holster, which “fit perfect with the . . . Ruger”; and three cell phones lying on the floor of the driver’s side, (Tr. 122). Detective Myles also observed a “Hi-Point .45 semi-automatic” pistol lying on the floor of the passenger’s side. (Tr. 122).

Officer Richard Jennings of the Fort Wayne Police Department’s K-9 unit and his police dog, Chico, responded to the location of the crash to assist in locating the driver and passenger of the Mustang. Officer Jennings “[s]tarted working [Chico] around the car to see if [he] could pick up scent” (Tr. 159). Chico picked up a scent and started “tracking right over some fresh footprints in the snow . . . leading directly away from the car in a line” toward some woods. (Tr. 160). Officer Jennings let Chico off his lead to allow Chico to track through the undergrowth.

Subsequently, Chico “came running back to [Officer Jennings,] carrying a tan Carhart knit hat.” (Tr. 162). Officer Jennings noticed that the hat was soft, indicating that it had not been lying on the ground for very long. Officer Jennings also knew that it had not been on the ground for long because “if it had been laying [sic] there . . . a day or

two, [Chico] would've ignored it because there would've been no recent human scent transfer on it." (Tr. 163). Officer Jennings took the hat and continued the search.

Eventually, Chico tracked to a garage and "indicated that there was scent coming out of that garage." (Tr. 164). After announcing his and Chico's presence, Officer Jennings "gave Chico the command to go in and search the garage." (Tr. 165). When Chico started searching the garage, "a subject inside the garage started yelling . . ." (Tr. 165). At Officer Jennings's command, the subject—later identified as Masterson—exited the garage. Officer Jennings sent Chico back into the garage, where Chico found a second man, identified as Ronald Holley.

Officer Jennings noticed that the Masterson was wearing tan Carhart "bibs or pants." (Tr. 166). Officer Jennings asked Masterson whether the stocking hat previously picked up by Chico belonged to him "because he was wearing a tan Carhart outfit and it was a Carhart hat." (Tr. 173). Officer Jennings wanted to return the hat to Masterson "if it was his property . . ." because "[i]t was cold out there." (Tr. 173, 175). Masterson responded that "it was . . . his hat and he would like it back, so [Officer Jennings] gave it to him." (Tr. 181). Although Masterson was in police custody at this time, Masterson had not been advised of his *Miranda* rights.

On February 24, 2006, the State charged Masterson with unlawful possession of a firearm by a serious violent felon, a class B felony. The State also alleged Masterson to be an habitual offender.

The trial court conducted a jury trial on November 14, 2006. Also on November 14, 2006, Masterson filed a motion in limine, seeking to prohibit "[a]ny responses elicited

in post-custodial questions of [Masterson] absent a showing that he was properly advised of his rights through the giving of a *Miranda* warning[.]” (App. 16). The trial court denied the motion. At trial, Masterson objected to the State asking Officer Jennings what he did with the hat found by Chico. The trial court overruled his objection, and Officer Jennings testified that when asked whether the hat belonged to him, Masterson replied that it did. The jury found Masterson guilty as charged and found Masterson to be an habitual offender.

The trial court held a sentencing hearing on December 14, 2006. The trial court sentenced Masterson to fifteen years and enhanced that sentence by adding thirty years for being an habitual offender, for a total executed sentence of forty-five years.

DECISION

Masterson asserts that the trial court improperly admitted Masterson’s statement to Officer Jennings regarding the hat belonging to him because the statement was made without *Miranda* warnings. Specifically, Masterson argues that Officer Jennings’ questions regarding the hat were designed to elicit incriminating responses.

The admission or exclusion of evidence is a matter left to the sound discretion of the trial court. *Terry v. State*, 857 N.E.2d 396, 409 (Ind. Ct. App. 2006), *trans. denied*. On review, we will not reweigh the evidence. *Id.* “Instead, we will consider all conflicting evidence in favor of the trial court’s ruling, and only the uncontested evidence favorable to the defendant.” *Id.*

Miranda warnings are based upon the Fifth Amendment’s privilege against self-incrimination and were designed to protect an individual from being compelled to testify

against himself. *Gibson v. State*, 733 N.E.2d 945, 952 (Ind. Ct. App. 2000). Police officers are not required to give a defendant a *Miranda* warning unless the defendant is in custody and subject to interrogation. *Id.* “Interrogation includes both express questioning and words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 752-53. Interrogation, however, “must involve a measure of compulsion beyond that inherent in custody itself.” *Id.* at 753. Thus, not every question posed by an officer amounts to interrogation for the purposes of *Miranda*. *Wright v. State*, 766 N.E.2d 1223, 1231 (Ind. Ct. App. 2002).

Here, Officer Jennings testified that when he first came upon the scene of the crash, he had not been advised that either of the Mustang’s occupants had been wearing a hat. Officer Jennings testified that he started “working [Chico] around the car” to pick up a scent until Chico picked up a scent “in front of the vehicle” and tracked the scent “right over some fresh footprints in the snow, . . . leading directly away from the car in a line towards th[e] wood lines.” (Tr. 160). According to Officer Jennings’s testimony, Chico was tracking a scent into the woods when he “came running back to [Officer Jennings,] carrying a tan Carhart knit hat.” (Tr. 162). Officer Jennings testified that he concluded that the hat had been dropped recently, since it “was still nice and soft” and “had recent scent on it.” (Tr. 163). Officer Jennings further testified that after he took the hat from Chico, Chico “immediately went back out the way he had come” and continued tracking until he came to the garage, where Masterson and Holley were discovered.

Officer Jennings testified that after he encountered Masterson, he asked Masterson whether the hat belonged to him because 1) the hat matched Masterson's clothing; and 2) if the hat did belong to Masterson, he wanted to give it back to him because the weather was cold. Officer Jennings, however, also testified that he "believed that [the hat] was probably dropped by somebody that . . . [the police] were tracking," based on the fact that Chico had picked up the hat. (Tr. 172).

Given these facts, we find that Officer Jennings should have known that his questions were reasonably likely to elicit an incriminating response from Masterson, and therefore, required a *Miranda* warning. Thus, we find that the trial court erred in admitting testimony concerning Masterson's statements.

Nonetheless, statements obtained in violation of *Miranda* and erroneously admitted are subject to harmless error analysis. The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt which satisfies the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction. A federal constitutional error is reviewed de novo and must be "harmless beyond a reasonable doubt." The court must find that the error did not contribute to the verdict, that is, that the error was unimportant in relation to everything else the jury considered on the issue in question.

Morales v. State, 749 N.E.2d 1260, 1267 (Ind. Ct. App. 2001) (internal citations omitted).

We conclude that any error in the admission of the evidence was harmless. Masterson's statements were merely cumulative of other evidence of constructive possession of a firearm; namely that (1) Detective Myles observed two men in the Mustang; (2) both men fled the scene after the Mustang crashed; (3) Detective Myles found guns on the floorboards of both the driver's and passenger's side of the Mustang;

(4) Chico tracked the men's scent from the Mustang to the garage, where (5) Masterson and Holley were hiding.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.