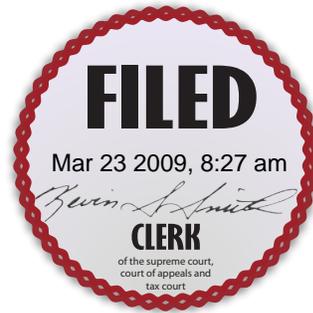


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

DONALD J. DICKHERBER

Columbus, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER

Attorney General of Indiana

JODI KATHRYN STEIN

Deputy Attorney General

Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL LEE SMILEY,)

Appellant-Defendant,)

vs.)

No. 03A01-0809-CR-428

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT

The Honorable Chris D. Monroe, Judge

Cause No. 03D01-0804-FC-841

March 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael Lee Smiley appeals his conviction for Receiving Stolen Property, as a Class C felony, following a jury trial. We address the following on review:

1. Whether the evidence is sufficient to support Smiley's conviction.
2. Whether the prosecutor's closing argument constitutes prosecutorial misconduct that rises to the level of fundamental error.
3. Whether the trial court abused its discretion when it admitted into evidence photographs of boxes that did not show the contents of those boxes.

We affirm.

FACTS AND PROCEDURAL HISTORY

A-1 Specialized Services and Supplies ("A-1") is a Corydon, Pennsylvania company that buys large quantities of catalytic converters in order to recover precious materials from them.¹ A-1 then sells those precious metals to a company in South Africa, which refines the material. On April 8, 2008, A-1 loaded a truck with fourteen boxes of primary material and six boxes of floor sweeps for shipment to South Africa.² Due to a flat tire, the truck sat overnight in the shipper's unsecured lot in New Jersey, where the shipment was stolen. A-1 notified all major suppliers in the United States of the theft.

On April 18, a person who identified himself as "Michael Smith" called Legend's Smelting and Recycling in Columbus, Indiana. Smith spoke with Lorraine Stroup, gave a

¹ Catalytic converters contain Rhodium, which sells for \$9000-\$10,000 per troy ounce; platinum, which sells for "close to" \$2000 per ounce, Transcript at 359; and palladium, which sells for \$450 per ounce.

² "Primary material" is the sand-like crushed metal that A-1 recovers from the interior of catalytic converters. The material referred to as "floor sweeps" consists of primary material that drops to the floor or into A-1's machinery during the recovery process. "Floor sweeps," also known as "substrate," also have "a tremendous amount of value" and, therefore, they are also collected and sold for refining. Transcript at 370.

local phone number, and offered for sale 6000-9000 pounds of floor sweeps.³ That phone number was registered to Michelle Smiley, Michael Smiley's wife. Stroup thought the call was odd because of the recent theft of A-1's shipment and the caller's use of the term "floor sweeps." Therefore, she conferred with Legend's operations manager, Robert Hess. When Stroup later attempted to reach "Smith" at the number given, she was unable to reach him. She left a message, but "Smith" did not return her call.

On April 21, Smiley appeared at Legend's in a Budget Rental Truck containing four Gaylord boxes⁴ of floor sweeps. Smiley told Hess that the boxes contained "high grade material." Transcript at 506. Smiley asked forty-five dollars per pound and said he had more available for sale. Suspecting that the boxes belonged to A-1, Hess and Stroup off-loaded one of the boxes for inspection while discretely contacting the police and A-1. While off-loading a box, Hess detected a strong odor of paint in the truck. Some of the boxes were marked with fresh pink paint.

Officers Ryan Floyd and Marc David Hutcheson⁵ of the Columbus Police Department were dispatched to Legend's in response to Hess' call. Officer Hutcheson walked by Smiley while Officer Floyd asked Hess to point out the person possessing the allegedly stolen property. While Officer Hutcheson was waiting for Officer Floyd,

³ A typical small business recovering precious metals from catalytic converters might collect an amount filling a fifty-five-gallon drum in a couple of months. Usually sellers to Legend's bring in only five-gallon buckets of floor sweeps.

⁴ A "gaylord box" is a box made of thick cardboard and is four feet by four feet by forty-three inches high. A-1 uses gaylord boxes, lined with three-mill thick plastic liners, for shipping primary material and floor sweeps.

⁵ The transcript refers to this officer by two spellings: Hutchison and Hutcheson. We use the latter, which is the form used by Detective Foust in the Affidavit for Probable Cause.

Smiley told Officer Hutcheson that he had obtained the material “out of state” and had held it for “roughly sixty days” until the price went up. Id. at 455.

Detective Thomas Foust, pawn coordinator and metal theft coordinator with the Columbus Police Department, responded to the scene at the officers’ request. Detective Foust obtained and executed a search warrant on the truck and the boxes. The contents of the open, off-loaded box looked the same as the contents of the remaining three boxes. The weight of each box matched the weight of one of the boxes of floor sweeps stolen from the A-1 shipping truck, and affixed to one of the boxes was an A-1 shipping label. Officer Foust arrested Smiley. A pat-down search of Smiley revealed a bag of catalytic converter dust, or primary material, in his jacket pocket.

The State charged Smiley with receiving stolen property, as a Class C felony; receiving stolen auto parts, as a Class D felony; and possession of a controlled substance, as a Class D felony. On the State’s motion, the court dismissed the counts charging Smiley with receiving stolen auto parts and possession of a controlled substance. The court later granted the State leave to amend the charging information to read as follows:⁶

That on or about April 21, 2008[,] in Bartholomew County, State of Indiana, the defendant, Michael Lee Smiley did knowingly receive, retain or dispose of the property of another person to-wit: metal of A-1 Specialized Services and Supplies and/or Impala Platinum; said property having been the subject of a theft, said property having a fair market value of at least one hundred thousand dollars.

⁶ The State originally charged:

That on or about April 21, 2008[,] in Bartholomew County, State of Indiana, the defendant, Michael Lee Smiley did knowingly receive, retain or dispose of the property A-1 Specialized Services and Supplies, to-wit: Metal; said property having been the subject of a theft, said property having a fair market value of at least one hundred thousand dollars.

Appellant's App. at 54.

Defendant was tried July 22 through 24, 2008, and a jury found him guilty of receiving stolen property, as a Class C felony. The trial court entered judgment accordingly and sentenced Smiley to six years in the Department of Correction. Smiley now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Smiley contends that the evidence is insufficient to support his conviction for receiving stolen property, as a Class C felony. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To convict Smiley of receiving stolen property, the State was required to prove, beyond a reasonable doubt, that he knowingly received, retained, or disposed of the property of another person that has been the subject of theft. Ind. Code § 35-43-4-2(b). To prove the offense as a Class C felony, the State had to show that the stolen property had a fair market value of at least \$100,000.

“Knowledge that the property is stolen may be established by circumstantial evidence; however, knowledge of the stolen character of the property may not be inferred

solely from the unexplained possession of recently stolen property.” Barnett v. State, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005) (quoting Johnson v. State, 441 N.E.2d 1015, 1017 (Ind. Ct. App. 1982)). The test of knowledge is a subjective one, asking whether the defendant knew from the circumstances surrounding the possession that the property had been the subject of a theft. Id. (citing Purifoy v. State, 821 N.E.2d 409, 414 (Ind. Ct. App. 2005), trans. denied). Possession of recently stolen property when joined with attempts at concealment, evasive or false statements, or an unusual manner of acquisition may be sufficient evidence of knowledge that the property was stolen. Id.

Smiley contends that his conviction should be reversed because the State did not prove the offense as alleged in the information. In particular, he argues that the State was required to prove that Smiley knew the floor sweeps belonged to A-1. In support, Smiley cites to Gibson v. State, 643 N.E.2d 885 (Ind. 1994). There this court affirmed Gibson’s convictions for attempted auto theft and receiving stolen property. Gibson petitioned for transfer, arguing that the statute that proscribes receiving stolen property requires some proof of a third-party thief. After reviewing the evolution of the statute proscribing theft and receiving stolen property, our supreme court agreed with this court’s holding that the State is not “required to prove the presence of a third-party thief in order to convict a defendant of receiving stolen property.” Id. at 888.

Citing Gibson, Smiley argues that “the actual words that the State uses to charge the offense will affect the State’s burden of proof. The State must prove beyond a reasonable doubt the conduct charged in the information.” Appellant’s Brief at 13 (quoting Gibson, 643 N.E.2d at 891 fn.12). But in that quote the court was discussing

whether the choice of verb used to charge theft or receiving stolen property could require the State to prove whether the defendant was the actual thief. Nonetheless, the quoted language correctly describes the State's burden to prove the offense as charged in the information.

But Gibson does not stand for the proposition that the State can add an element to the offense of receiving stolen property merely by the word order or choice in the information. Again, here, the information alleged:

That on or about April 21, 2008[,] in Bartholomew County, State of Indiana, the defendant, Michael Lee Smiley did knowingly receive, retain or dispose of the property of another person to-wit: metal of A-1 Specialized Services and Supplies and/or Impala Platinum; said property having been the subject of a theft, said property having a fair market value of at least one hundred thousand dollars.

Appellant's App. at 54. We do not read the information as narrowly as Smiley does. By statute the State was required to prove that Smiley knowingly received, retained, or disposed of the property of another. See Ind. Code § 35-43-4-2(b). The information alleges that Smiley knowingly received, retained, or disposed of the metal that belonged to A-1. Naming the owner of the stolen property is necessary to describe the property. Wertheimer & Goldberg v. State, 201 Ind. 571, 169 N.E. 40, 42 (1929). But that description does not create a new element of the offense. Thus, Smiley's contention that the State was required but failed to prove he knew the owner of the property must fail.⁷

⁷ In arguing that the evidence is insufficient to support his conviction because of the State's failure to prove that Smiley knew who owned the stolen property, Smiley also refers to the language of two jury instructions. Smiley cites no law to show how the language of the jury instructions affects the State's burden of proof. And we have already determined that the State did not add an element to the offense of receiving stolen property by its wording of the charge in the amended information. Smiley's reference to the jury instructions does not alter our determination.

A-1's shipment of primary material and floor sweeps was stolen from a New Jersey lot on April 8. The evidence shows that Smiley lived in Columbus, traveled to New Jersey between April 7 and 8, 2008, and did not return to Columbus until April 11. On April 16, Smiley traveled through Wheeling, West Virginia to Pennsylvania. On April 18, "Smith" called Legend's to offer floor sweeps for sale and gave Smiley's Indiana phone number. On April 19, Smiley rented a Budget Rental Truck in Pennsylvania with a return to Columbus, Indiana. He then traveled to Indiana on April 19 and 20.

On April 21, Smiley attempted to sell four gaylord boxes of floor sweeps to Legend's. While there, he told Officer Hutcheson that he had held the floor sweeps for roughly sixty days to await better prices. Dr. Rajesh Mishra, a metallurgical engineer employed by A-1, testified that the floor sweeps Smiley had offered for sale belonged to A-1, because the weight of each box matched the weights on A-1's packing list for the stolen shipment. Dr. Mishra also testified that the markings on the boxes matched those made by an A-1 employee at the time of packaging; the boxes at issue were part of a shipment that had been stolen from a delivery truck in Pennsylvania; it was unlikely for a single individual to possess more than a five-gallon bucket of floor sweeps; and small businesses might acquire a fifty-five-gallon drum of floor sweeps over a couple of months. Both Dr. Mishra and Detective Foust inspected each of the boxes and testified that each contained floor sweeps. And Dr. Mishra testified that the four boxes of floor sweeps were valued between \$151,243 and \$310,185. We conclude that the evidence

was sufficient to show that Smiley knowingly received, retained, or disposed of the metal that belonged to A-1.

Issue Two: Prosecutorial Misconduct

Smiley next contends that “the trial court committed fundamental error when it failed to admonish the jury after the prosecutor made comments during his argument which directly or indirectly may have been interpreted by the jury as [a] comment on Smiley’s exercise of his right[not to testify.]” Appellant’s Brief at 20. Whether a prosecutor’s argument constitutes misconduct is measured by reference to caselaw and the Rules of Professional Conduct. Sobolewski v. State, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008), trans. denied. “The Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from the defendant’s silence.” Hancock v. State, 737 N.E.2d 791, 798 (Ind. Ct. App. 2000).

We have explained the applicable standard of review regarding a claim of prosecutorial misconduct as follows:

When an improper argument is alleged to have been made, the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, then he or she should move for mistrial. Failure to request an admonishment or to move for mistrial results in waiver. Where a claim of prosecutorial misconduct has not been properly preserved, our standard for review is different from that of a properly preserved claim. More specifically, the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue. It is error that makes “a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.”

Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2007) (internal citations omitted, alterations original).

In Hancock, this court addressed a claim of prosecutorial misconduct arising from the deputy prosecutor's comments during closing argument:

At the close of the State's case-in-chief, Hancock and his co-defendant rested without presenting evidence. During the State's rebuttal closing argument, the deputy prosecuting attorney commented as follows:

I asked you to remember the evidence and when there's argument about things which there was no evidence then you should take that into consideration. There was no evidence about two other guys doing a burglary. The fact that the burglary charge has been dropped out is simply because there's no fingerprints or anything that puts these defendants at the burglary scene. There's no fingerprints that were collected at all and under the law if you merely have possession of the stolen goods right after the burglary occurred and nothing more, that's not enough to take the case to the jury, and that's why you haven't been given that part of it. It didn't say that they didn't do the burglary. But, the evidence the police provided to you wasn't enough to get it to you for your consideration. We hear all this story about these two other guys who did the burglary, but there was no evidence about two other guys that did the burglary. And there's this story about (sic) that Mr. Antalis is talking about that they bought it from these two other guys. There was no evidence about you know, where are those other two guys. If anybody could bring them forth I mean, they weren't brought forth for you. So, you should consider the evidence that you've been brought and not just mere speculation about all the things that could have happened.

Hancock, 737 N.E.2d at 797 (internal citation omitted).

Hancock did not object to the deputy prosecutor's comments at trial, but on appeal he argued that the comments constituted fundamental error. This court disagreed:

The prosecutor made no direct reference to Hancock's failure to testify. Nor do we believe that the prosecutor's comments were subject to a

reasonable interpretation by the jury as inviting an adverse inference from Hancock's silence. More pointedly, the State merely commented on the lack of evidence presented by the defense to contradict the State's case. Although Klinger's testimony alluded to four men coming to her apartment on the night of the burglary, the defense presented no direct evidence to bolster its theory that someone other than Hancock committed the crimes. Under these circumstances, we do not see the prosecuting attorney's statements as an inappropriate comment on Hancock's failure to testify. Rather, the deputy prosecuting attorney was merely commenting on the defendant's failure to present convincing evidence to support his defense.

Id. at 798. Thus, the court found no prosecutorial misconduct.

Here, Smiley argues that the prosecutor committed fundamental error in his rebuttal closing argument by indirectly commenting on Smiley's exercise of his right not to testify, as follows:⁸

[T]he defense would have you believe that the Defendant did nothing to try to hide the fact that these boxes were stolen. The Defendant did not reveal his source for the property. He did not reveal the location of the property. He did not reveal where it was bought, how he got out to Pennsylvania. You know, they, they brought out the point about how he got out there and drove the truck back. Didn't hear anybody testify yeah I drove Michael Smiley out there or anything like that. Everything the defense points to as evidence that he did not know that the property was stolen is also consistent with the Defendant knowing that the property was stolen but needing to sell it or get rid of it so it would have some value to him.

* * *

Now, the Defendant also at Legend's Smelting, and I think this is absolutely (inaudible), told Officers Hutcheson and Floyd, did not (inaudible) but he did tell them, kind of touched upon it already the source, (inaudible), the circumstances, we didn't hear any of that.

Transcript at 749, 750-51 (emphases added).⁹

⁸ Specifically, Smiley argues that the trial court "committed fundamental error when it failed to admonish the jury after the prosecutor made [those] comments . . ." Appellant's Brief at 20. Because we determine that the prosecutor's comments do not rise to the level of fundamental error, we need not address Smiley's argument that the trial court should have admonished the jury.

Here, the State did not directly or indirectly refer to Smiley's failure to testify. The first statement quoted above points to shortfalls in the defense theory. Such a comment by the State is not an inappropriate comment on Smiley's failure to testify. See Hancock, 737 N.E.2d at 798. Instead, the prosecutor's comments point out shortcomings in the defense's theory. Due to inaudible portions, the second statement does not even make sense. The prosecutor's statements in his rebuttal closing argument do not constitute prosecutorial misconduct.

Issue Three: Admission of Photographs

Smiley contends that the trial court abused its discretion when it admitted into evidence certain photographs of the gaylord boxes containing floor sweeps.¹⁰ The admission of evidence falls within the sound discretion of the trial court. Bradley v. State, 770 N.E.2d 382, 385 (Ind. Ct. App. 2002), trans. denied. We review the admission of photographic evidence for an abuse of discretion. Id. Photographic evidence which is relevant may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Id. If photographs, even those gruesome in nature, act as interpretive aids for the jury and have strong probative value, they are admissible. Id.

⁹ The underlined text represents the portion of the argument alleged by Smiley to constitute prosecutorial misconduct.

¹⁰ Smiley makes several arguments regarding the photographs. But his arguments are confusing, and not all address the admission of evidence. In this section of our decision we discuss the arguments that regard the admission of evidence. Smiley's two additional arguments, that certain photographs show only the top layer of the contents and that "[t]here is no evidence, in short, as to the contents of these boxes[.]" regard the sufficiency of evidence. Appellant's Brief at 28. The first argument amounts to a request that we reweigh the evidence, which we cannot do. See Jones, 783 N.E.2d at 1139. And the second argument is disingenuous, because Smiley acknowledges Dr. Mishra's testimony regarding the contents of the boxes and their value.

Smiley argues that photographs of the exteriors of some of the boxes should not have been admitted into evidence because they “were not competent evidence . . . as to the contents of those boxes” and there were no corresponding photographs of the boxes’ contents. Appellant’s Brief at 28. In support of his argument, Smiley relies on Indiana Code Section 35-43-4-4, which provides in relevant part:

(g) A judge may find that a photograph of property over which a person is alleged to have exerted unauthorized control or to have otherwise obtained unlawfully is competent evidence, if the photograph:

(1) will serve the purpose of demonstrating the nature of the property; and

(2) is otherwise admissible into evidence under all other rules of law governing the admissibility of photographs into evidence.

The fact that it is impractical to introduce into evidence the actual property for any reason, including its size, weight, or unavailability, need not be established for a judge to find a photograph of that property to be competent evidence. If a photograph is found to be competent evidence under this subsection, it is admissible into evidence in place of the property and to the same extent as the property itself.

Exhibits 23 and 24 are photographs of the “actual content[s] of the boxes.” Appellant’s Brief at 28. Exhibits 1 through 19 and 21 show photographs of the exteriors of the four boxes. By arguing that the photographs of the exteriors of the boxes are not competent evidence of the boxes’ contents, Smiley assumes that the only purpose of Exhibits 1 through 19 and 21 was to demonstrate the contents of the boxes. But Dr. Mishra referred to those photographs when he testified that the markings on them were made by A-1 an employee when packing the boxes. In other words, the photographs

were evidence that assisted Dr. Mishra in identifying the boxes as A-1's property.¹¹ Smiley's argument that the trial court abused its discretion by admitting photographs in Exhibits 1 through 19 and 21 because they do not show the contents of the boxes is without merit.

Smiley also observes that the prosecutor cited Indiana Code Section 35-43-4-4(h), which "allows the property [at issue] to be returned [to the rightful owner] and a photograph used in its place if the property has been photographed in a manner that will serve the purpose of demonstrating the nature of the property." Appellant's Brief at 30 (citing Ind. Code § 35-43-4-4(h)) (emphasis original). But Indiana Code Section 35-43-4-4(h) regards the return of property, not the admission of evidence. Thus, Section 35-43-4-4(h) does not support Smiley's argument that the trial court should not have admitted photographs of the exteriors of the boxes.¹²

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.

¹¹ Again, Dr. Mishra and Detective Foust inspected each of the boxes and found that each contained floor sweeps. Also, the markings on the boxes and weights of the boxes identified them as belonging to A-1.

¹² Smiley also observes that the State's return of the boxes to A-1 deprived him of the opportunity to examine the contents of the boxes. But Smiley admits that he had "not asked the court to have the boxes brought back." Appellant's Brief at 32. Moreover, any argument regarding the nature of the contents of the boxes goes to the sufficiency of evidence, which, again, we have already addressed in Issue One above.