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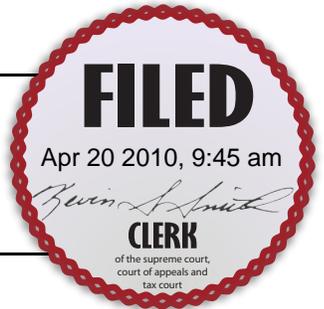
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**IN THE
COURT OF APPEALS OF INDIANA**



TERRY J. WEBSTER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 39A04-0904-CR-225

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0802-FC-34

April 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Terry J. Webster appeals his convictions for Class C felony burglary and Class D felony theft. We conclude that the trial court abused its discretion by precluding Webster from cross-examining a State's witness about his habitual offender eligibility and the fact that the State neither charged him with nor asked him to plead guilty to being a habitual offender. However, we also conclude that the error was harmless and therefore affirm.

Facts and Procedural History

Andrea England worked as a floor manager at Ace Hardware on Clifty Drive in Madison, Indiana. As a floor manager, England had a key to the front door, the security code for the alarm system, a key to the safe in the office, and the security code for that safe. On an evening in January 2008, when it was time to close the store, England put credit card receipts, checks, and cash in a blue bank bag. She then placed the bank bag in the office safe, locked the safe, turned on the alarm system, and locked the front door.

Later that night, England left her home to "cruise[] the strip" on Clifty Drive. Tr. p. 110. When she saw Justin Maddox in the parking lot of a car wash, she stopped to hang out with him. Webster arrived at the car wash a while later. The three of them began grabbing each other's keys and tossing them around. Webster and Maddox tossed England's Ace Hardware keys between them and asked about the particular use of each key. England eventually told Webster and Maddox which key went to Ace Hardware's front door, which key went to the office safe, and the security codes for both the alarm system and the office safe. She also told them where the alarm system was located and how to minimize being seen on the security cameras. Webster and Maddox told England

that they planned to rob Ace Hardware, she should leave the car wash, and Maddox would contact her afterwards.

After England left the car wash, Webster and Maddox set out for Ace Hardware. While Maddox acted as a lookout, Webster unlocked the front door with England's key. When they heard a car approaching, they both retreated to the side of the building. After the car passed, Webster drilled the lock in an attempt to make it appear that entry was forced. Once inside, Webster immediately turned to his left and disabled the alarm system using the security code provided by England. He then proceeded to the office while Maddox picked up a red gas can and tools that Webster wanted. In the office, Webster used the key and security code provided by England to open the safe and empty it. He also drilled the lock. Webster and Maddox left the store with nearly \$2000 in cash and checks and nearly \$200 in inventory. State's Ex. 1 from Sentencing Hearing. (Affidavit for Restitution).

Maddox called England and told her to meet them at Jefferson Proving Ground. Once all three were there, Webster unloaded the tools and the bank bag he had taken from the safe. England recognized the blue bank bag as the one she had placed in the safe while closing the store. Webster divided the money among the three and kept the stolen tools. After burning the credit card receipts, checks, and bank bag, Webster, Maddox, and England left Jefferson Proving Ground and returned to the car wash, where Webster and Maddox washed their cars. They eventually ended up at Mike's Grill to get some breakfast. They ordered food and were eating when Officer Tyson Eblen and two other officers from the Madison Police Department walked in. Officer Eblen noticed that

Webster, Maddox, and England kept looking at them and whispering and that they quickly left without finishing their meals. Before parting ways, Webster told Maddox and England that if they were questioned, they were to say that they were at Webster's trailer watching the movie "Mr. Woodcock."

England and Maddox were separately interviewed in February 2008, and both implicated the other and Webster in the burglary. When Webster was interviewed later that month, he claimed he was with his girlfriend Amanda Thornton at the time of the burglary.

The State charged Webster with Class C felony burglary,¹ Class C felony conspiracy to commit burglary, and Class D felony theft.² The State later dropped the conspiracy charge. England and Maddox both testified against Webster pursuant to their plea agreements with the State. Maddox's plea agreement provided, among other things, that he would plead guilty to Class C felony burglary and the State would recommend a four-year executed sentence.

Before Maddox's testimony and outside the presence of the jury, defense counsel stated that he intended to cross-examine Maddox about the fact that he was eligible for sentence enhancement as a habitual offender when he was charged with the Ace Hardware offenses and that the State did not charge him with being a habitual offender or ask him to plead guilty to a habitual offender charge. Defense counsel's theory was that Maddox received the benefit of not only being sentenced to only four years for the burglary but also not being sentenced as a habitual offender, which could have added an

¹ Ind. Code § 35-43-2-1.

² Ind. Code § 35-43-4-2.

additional twelve years. *See* Tr. p. 258-59. Although the State did not initially believe that Maddox was habitual offender eligible, after further discussion, the trial court and the parties agreed that he was indeed habitual offender eligible.

During voir dire on the issue, Maddox testified that although he had served time in prison for his second felony conviction, he did not know until after he entered the plea agreement for the Ace Hardware burglary that his plea in conjunction with his two prior unrelated felony convictions rendered him eligible to be charged as a habitual offender. When pressed by defense counsel, Maddox stated that no one during his prison stay had ever told him that a third conviction would make him habitual offender eligible because he deliberately avoided telling anyone about his prior felony convictions, both of which were sexual misconduct with a minor convictions. Maddox further testified that his attorney never discussed his habitual offender eligibility with him, the State never threatened him with a habitual offender charge, and no provision of his plea agreement referenced his habitual offender eligibility.

The State argued that Maddox could not have considered his habitual offender eligibility when deciding to enter into the plea agreement since neither he nor the State knew of his habitual offender eligibility at the time of the plea agreement. Defense counsel's position was that Maddox's testimony that he did not know of his habitual offender eligibility at the time of the plea agreement was not credible. The trial court ruled that defense counsel could not cross-examine Maddox about his habitual offender eligibility. Defense counsel made an offer of proof.

England and Maddox testified about the night of the burglary. Maddox stated that he pled guilty to Class C felony burglary and received a four-year sentence. Photographs of the damaged locks and the security camera recordings of Webster and Maddox at Ace Hardware were admitted into evidence. Maddox narrated two of the recordings as the jury watched them. Thornton, Webster's girlfriend at the time he was charged with the instant offenses, identified Webster as one of the men in the recordings by "[t]he hair line and the little bit of the face you can see." *Id.* at 415. Thornton testified that Webster instructed her "that if I was to ever be . . . questioned about [the crimes], that we were together at my parents' house watching the movie 'Mr. Woodcock' together." *Id.* at 409. She further testified that there was no way that Webster was with her that night because she did not know him at the time.

The jury found Webster guilty of Class C felony burglary and Class D felony theft. The trial court sentenced him to an aggregate term of six years with one year suspended. He now appeals.

Discussion and Decision

Webster contends that the trial court abused its discretion by precluding him from cross-examining Maddox about his habitual offender eligibility and the fact that the State neither charged him with nor asked him to plead guilty to being a habitual offender. A trial court has broad discretion to determine the scope of cross-examination, and its decision will be reversed only for an abuse of discretion. *Bullock v. State*, 903 N.E.2d 156, 160 (Ind. Ct. App. 2009). An abuse of discretion occurs where the decision is

clearly against the logic and effect of the facts and circumstances before the court or where the court misinterpreted the law. *Id.*

The Sixth Amendment of the United States Constitution guarantees a defendant the right to confront witnesses against him or her. *McCorker v. State*, 797 N.E.2d 257, 266 (Ind. 2003) (citing *Davis v. Alaska*, 415 U.S. 308, 315 (1974)). This right is secured for defendants in state criminal proceedings through the Fourteenth Amendment. *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 403 (1965)). Our Supreme Court has previously determined that any beneficial agreement between an accomplice and the State must be revealed to the jury. *Id.* (citing *Morrison v. State*, 686 N.E.2d 817, 818 (Ind. 1997); *Newman v. State*, 263 Ind. 569, 572-73, 334 N.E.2d 684, 687 (1975)). The full extent of the benefit offered to a witness is relevant to the jury's determination of the weight and credibility of the witness's testimony. *Id.*

Indiana Code section 35-50-2-8(a) provides that the State "may seek to have a person sentenced as a habitual offender for any felony by alleging . . . that the person has accumulated two (2) prior unrelated felony convictions." At the time of the Ace Hardware burglary, Maddox had two prior unrelated felony convictions. The fact that Maddox was habitual offender eligible and that the State neither charged him with nor asked him to plead guilty to being a habitual offender could support a reasonable inference that Maddox did indeed receive the benefit of not being sentenced as a habitual offender. This alleged benefit is relevant to the jury's determination as to the weight and credibility to be given to Maddox's testimony. Although the State claimed that it did not know Maddox was habitual offender eligible until Webster's trial and Maddox claimed

that he did not know he was habitual offender eligible until after he entered into the plea agreement, whether Maddox knew that he received this benefit was a question of fact for the jury to decide. We thus conclude that the trial court abused its discretion by precluding Webster from cross-examining Maddox about his habitual offender eligibility and the fact that the State neither charged him with nor asked him to plead guilty to being a habitual offender.

Although Webster was denied the opportunity to fully cross-examine Maddox about the extent of his bias in favor of the State, his convictions will not be reversed if the error is harmless; that is, if the State can demonstrate beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *See Standifer v. State*, 718 N.E.2d 1107, 1110-11 (Ind. 1999). An error is harmless if its probable impact on the jury, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. *Bullock*, 903 N.E.2d at 160.

Here, Maddox's testimony was corroborated by other witnesses and other evidence. England testified that before the burglary, she gave Webster and Maddox the keys and the security codes to Ace Hardware. She further testified that when she met them after the burglary, they had Ace Hardware packages and the blue bank bag she had placed in the safe when closing the store. Moreover, the condition of the locks at Ace Hardware after the burglary corroborate Maddox's testimony that Webster drilled the locks in an attempt to make it appear that entry was forced, and the security camera recordings substantiated Maddox's testimony regarding how the burglary was carried out. Further, Thornton testified that she was not with Webster at the time of the burglary and

identified Webster as one of the burglars in the security camera recordings by his hairline and by the portion of his face that was not covered. In addition, after the burglary, Officer Eblen saw Webster, Maddox, and England exhibit suspicious behavior and leave Mike's Grill soon after his arrival.

Although Webster highlights instances where England's and Maddox's testimony are inconsistent, *see* Appellant's Br. p. 13; Appellant's Reply Br. p. 7-8, we agree with the State that their testimony was substantially similar. That is, regardless of whether, for example, England and Maddox had sex at Jefferson Proving Ground before Webster met them at the car wash, England and Maddox both testified that England gave Webster and Maddox the keys and security codes to Ace Hardware, England was told that Maddox would contact her after the burglary, England met Webster and Maddox at Jefferson Proving Ground where Ace Hardware packages and the blue bank bag were taken out of Webster's car and the money was divided into thirds, they went to the car wash where Webster and Maddox washed their cars, they then went to Mike's Grill for breakfast where they left abruptly after police officers walked in, and Webster told England and Maddox that if they were questioned they were to say that they were at Webster's trailer watching the movie "Mr. Woodcock."

In light of all the evidence, we find that the probable impact of the trial court denying Webster the opportunity to fully cross-examine Maddox about the extent of his bias in favor of the State was sufficiently minor. We thus conclude that the error was harmless.

Affirmed.

NAJAM, J., and BROWN, J., concur.