

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.

ATTORNEYS FOR APPELLANT:

RUTH JOHNSON
Marion County Public Defender
Indianapolis, Indiana

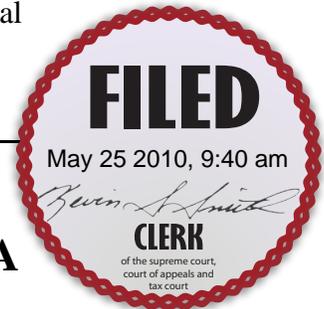
STEVEN J. HALBERT
Carmel, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



JUAN BEASLEY,)

Appellant-Defendant,)

vs.)

No. 49A02-0910-CR-1019

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Robert R. Altice, Judge

Cause No. 49G02-0906-FB-59829

May 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Juan Beasley appeals his conviction for two counts of Robbery, as Class B felonies. Beasley presents a single issue for review, namely, whether the trial court abused its discretion when it admitted into evidence a video tape, a 911 call transcript, and testimony about a GPS system. We conclude that Beasley waived review of the trial court's admission of the GPS system testimony but that the court properly admitted the security video tape as demonstrative evidence and the 911 call transcript under the excited utterance exception to the hearsay rule.

We affirm.

FACTS AND PROCEDURAL HISTORY

At 10:30 p.m. on June 27, 2009, Melissa Arkenau and Joshua Jones drove to Kohl's department store to shop in Indianapolis. When they arrived, Arkenau stepped out of the car to talk on her cell phone. A man later identified as Beasley approached Arkenau and pressed a small revolver into her stomach. He took her cell phone and then leaned inside the car and pointed the gun at Jones' face. Beasley threatened to kill Jones if he did not hand over his wallet. Jones complied. Beasley then reached in the car and retrieved from the passenger floorboard Arkenau's makeup bag and Coach purse, which contained jewelry, money, and prescription medication.

Jones and Arkenau watched Beasley enter the passenger side of a bluish-green four-door Chevrolet Malibu with a yellow "support our troops" sticker on the back bumper. Two other individuals were in the car but were not clearly identifiable. Arkenau noted the license number of the car, and Jones called 911 on his cell phone.

When police arrived shortly at Kohl's, Arkenau and Jones gave descriptions of the robber. Arkenau described him as a tall African-American man who had gold teeth and wore a black tee shirt, dark jeans, a "doo rag," and sunglasses with a white stripe on top. She also thought he had dreadlocks because there were "little things hanging down [from the doo rag]." Transcript at 53. Arkenau was able to see the robber because the parking lot was "pretty well lit." Id. Jones described the robber as a tall African-American man wearing black pants, a black shirt, a black "doo-rag," and "big brown sunglasses with stripes across the front." Id. at 114. The dome light of Jones' car helped him see the robber.

Arkenau told police that her Sprint cell phone had a GPS locator on it. Police were unable to track the phone but advised Arkenau that she might be able to track it on the computer. Arkenau and Jones went to his father's office nearby and eventually were able to locate the phone online. The online map showed that the phone was located near the intersection of New York and Eastern Streets in Indianapolis. Arkenau advised Lieutenant Schneider with the Lawrence Police Department ("LPD"), and the LPD in turn advised the Indianapolis Metropolitan Police Department ("IMPD") of the phone's location.

IMPD Officer Courtney Harris located a vehicle at the intersection of 10th Street and Rural Street that matched the description provided by Arkenau and Jones. That intersection is close to the intersection of Eastern and New York. The car was pulling out of a pawn shop parking lot. Officer Harris followed the car for a few blocks and then initiated a traffic stop. Beasley was in the front passenger seat of the vehicle. After

Officer Gregory Davis arrived at the scene, the officers asked the occupants to exit the car.

When the officers patted down Beasley, they found jewelry items and cash in his pocket. Further investigation revealed Arkenau's purse and makeup bag in a dumpster at an apartment complex at 12th Street and Rural Street. The police also found a cell phone in the car. When asked, Arkenau identified names in that cell phone. Then, at the request of police, Arkenau and Jones went to 10th and Rural, where they identified the car as the one in which the robber had left.

At the request of one of the officers, Arkenau viewed a lineup of three African-American men who were handcuffed on the ground. The men were "pretty far away" and there were no streetlights. *Id.* at 65. Arkenau asked to see one of the men closer. During the course of the lineup, Arkenau got a closer look at that man, and she heard him speak. Arkenau told police that she recognized his appearance and his voice, and then she identified that man, Beasley, as the robber. Jones viewed the lineup separately from Arkenau. He also asked to see Beasley up closer and identified Beasley as the robber based on his appearance and his voice. Both victims stated they were one hundred percent positive in their identifications.

The State charged Beasley with two counts of robbery, as Class B felonies. At the jury trial, Beasley objected to the admission of a Kohl's parking lot security video tape of the robbery as well as testimony regarding the use of the GPS locator in Arkenau's cell phone and a tape of Jones' 911 call. All were admitted over Beasley's objections. The jury returned a verdict convicting Beasley as charged on both counts. The trial court

entered judgment of conviction and sentenced Beasley accordingly. Beasley now appeals.

DISCUSSION AND DECISION

Beasley contends that the trial court abused its discretion when it admitted evidence over his objections. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

Beasley first contends that the trial court abused its discretion when it admitted into evidence the Kohl's parking lot security video tape, arguing as follows:

Beasley's attorney objected to [the] admission of the videotape because the State did not present any evidence concerning how and when the camera was loaded, how the camera was activated, when the video was taken, and the chain of custody after the film was removed from the camera. See McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).

Both victims of the robbery testified that the camera moved very fast so that only parts of the robbery would be shown for fleeting moments. No foundation whatsoever was laid for the admission of the tape. The case hinged on the disputed identification of Beasley as the robber. The admission of the tape was highly prejudicial because the tape would be seen by the jury as independent evidence to bolster their [sic?] version of the events which occurred at the Kohl['s'] parking lot.

Appellant's Brief at 4.

Beasley's argument is essentially that the State did not present an adequate foundation for the admission of the video tape as evidence of the crime itself. The State counters that Arkenau and Jones were to testify to the tape's accuracy and that the function of the tape was merely illustrative. As a general rule, photographs are admissible as demonstrative evidence if they illustrate a matter about which a witness has been permitted to testify. Timberlake v. State, 679 N.E.2d 1337, 1341 (Ind. Ct. App. 1997). The proponent of the evidence must first authenticate the photograph. Id. Specifically, the sponsoring witness must establish that the photograph is a true and accurate representation of the things that it is intended to portray. Id. Further, the photograph must be relevant. Id. A photograph is relevant if it depicts a scene that a witness would be permitted to describe verbally. Id.

Here, Arkenau and Jones both testified at trial regarding the images on the tape. Although they testified that the video tape images were frustrating, because of rapid camera movements, they nevertheless testified that it showed parts of the robbery. And both also described in testimony what happened in the robbery without referring to the video tape. As such, the tape was relevant because it showed the robbery, and the witnesses authenticated the images on the tape by their testimonies. Beasley's argument that the tape was improperly admitted must fail.

Beasley next argues that the trial court abused its discretion by allowing Arkenau to testify about

the information that Sprint's website gave her about the location of her cell phone which she then relayed to the police. There was no foundation for this testimony which would show how the GPS feature of her phone worked, and no hearsay exception allowed Arkenau to testify as to the

information provided by the Sprint website. Not only was Arkenau's testimony on this matter hearsay, there was no foundation to show whether the information was credible or reliable.

Appellant's Brief at 4-5 (citations omitted). Beasley then argued that the evidence was prejudicial because the jury "would assume that the police stopped the correct vehicle because Arkenau's cell phone told the police where to go." *Id.* at 5. Beasley has not supported his argument with citation to relevant authority. Beasley also failed to provide cogent analysis of his argument. As such, the issue is waived.

Finally, Beasley contends that the trial court should not have admitted into evidence a transcript of Jones' 911 call. In particular, he argues that the transcript was hearsay and did not qualify as an exception for present sense impressions under the hearsay rule. Indiana Rule of Evidence 801 states that hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay evidence is generally inadmissible absent evidence that the statement is subject to one of the statutory exceptions under Indiana Rule of Evidence 803. But a statement may be admitted under Indiana Rule of Evidence 803(2)—the exception for an excited utterance—if three elements are shown: (1) a startling event; (2) a statement made by a declarant while under the stress of excitement caused by the event; and (3) that the statement relates to the event. *Fowler v. State*, 829 N.E.2d 459, 463 (Ind. 2005), cert. denied, 126 S. Ct. 2862, 165 L. Ed. 2d 898 (2006). The ultimate issue is whether the statement is deemed reliable because of its spontaneity and lack of thoughtful reflection and deliberation. *Id.*

Here, immediately before Jones called 911, Beasley had pointed a gun in Jones' face and demanded his wallet. Beasley had also just robbed Arkenau at gunpoint. We agree with the State that the 911 call transcript qualifies as an exception to the hearsay rule as an excited utterance. The robbery clearly qualifies as a startling event, Jones made the call immediately after the robbery, and the call relates to the robbery. Thus, the trial court did not abuse its discretion by admitting the 911 call transcript under the excited utterance exception to the hearsay rule.

In sum, Beasley has not shown that the trial court abused its discretion by admitting the video tape, Arkenau's testimony about the GPS locator in her phone, or the 911 call transcript. And, in any event, all of this evidence was cumulative to the testimony offered by Arkenau and Jones regarding the robbery as well as the direct evidence of stolen items found in Beasley's possession. Thus, any error in the admission of the evidence complained of was not prejudicial because it was merely cumulative of other evidence in the record. See Pavey v. State, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002), trans. denied.

Affirmed.

VAIDIK, J., and BROWN, J., concur.