



## Akins v. State

884 N.E.2d 433 (2008) | Cited 0 times | Indiana Court of Appeals | April 10, 2008

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### MEMORANDUM DECISION

### NOT FOR PUBLICATION

### STATEMENT OF THE CASE

Appellant-Defendant Anthony J. Akins (Akins) appeals his conviction for attempted theft, as a Class D felony, Ind. Code §§ 35-43-4-2(a), 35-41-5-1, and his adjudication as a habitual criminal offender, I.C. § 35-50-2-8.

We affirm.

### ISSUE

Akins raises two issues on appeal, which we restate as follows:

- (1) Whether the trial court properly permitted a security videotape to be presented to the jury; and
- (2) Whether the trial court committed reversible error by allowing the State to admit hearsay for the purpose of showing "course of investigation" by someone who is not a police officer.

### FACTS AND PROCEDURAL HISTORY

On July 29, 2006, Akins attempted to return a power washer, without a receipt, to a Wal-Mart located in Goshen, Indiana. When Akins presented the power washer to Julie Miller (Miller), a clerk working at the customer service counter, Miller followed store policy and called a store manager to approve the transaction. The assistant store manager, Margaret Ostrander (Ostrander), asked Akins when the power washer had been purchased. He told her it had been purchased from her store about two weeks prior. By looking at the warehouse pick ticket, Ostrander discerned that the item had been shipped to her store from a particular warehouse and was part of her store's inventory. Using the date of purchase and information from the warehouse pick ticket, Ostrander looked into the store's



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computerized inventory system and determined that her store had not sold a power washer within the past six weeks. Knowing that the computer would produce an electronic receipt if the power washer had been purchased from her store, Ostrander also entered the UPC number that was specific to the power washer Akins presented. The computer did not show a receipt.

Ostrander then became suspicious that the attempted transaction might be fraudulent and called the Asset Protection Coordinator, Sharon Ireman (Ireman). Ireman reviewed security videotape of the incident. At trial and over Akin's objection, Ostrander testified that Ireman told her the security tape, which monitors the front doors and various locations throughout the store, revealed that Akins did not enter the store with a power washer. Ostrander also testified that she asked a hardware department employee to visually inspect the shelf space where the power washers were located. The employee reported that there were two power washers present in the morning but, upon inspection per Ostrander's request, there was only one. With knowledge of the security videotape and the hardware department employee's observations, Ostrander returned to the customer service counter and informed Akins that she would not be able to provide him with a refund for the power washer. Akins left his identification card behind when he left the store without the power washer. Ostrander, subsequently, called the police.

On November 15, 2006, the State filed an Information charging Akins with attempted theft, as a class D felony, I.C. §§ 35-43-4-2(a), 35-41-5-1. The Information also charged Akins with habitual criminal offender enhancement. I.C. § 35-50-2-8. A jury convicted Akins of attempted theft on July 9, 2007 and the Habitual Criminal Offender enhancement. Also on July 9, 2007, Akins was sentenced to serve an aggregate seven and one-half years in the Indiana Department of Correction with one year suspended to probation.

Akins now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. Standard of Review

The decision to admit evidence is within the trial court's sound discretion. *Dixon v. State*, 869 N.E.2d 516, 519 (Ind. Ct. App. 2007). This court will not disturb the trial court's ruling unless it determines the trial court abused that discretion resulting in denial of a fair trial. *Id.* A decision that involves an abuse of discretion "is clearly against the logic and effect of the facts and circumstances before the court." *Id.* When considering the admissibility of evidence, this court "will only consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor." *Id.*

### II. Security Videotape

Akins argues that the security videotape was inadmissible evidence because the State failed to lay a



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sufficient foundation under the silent witness theory. The "silent witness" theory allows videotapes and photographs to be admitted into evidence as substantive, rather than demonstrative, evidence. *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002); *Shepherd v. State*, 690 N.E.2d 323, 323 (Ind. Ct. App. 1997). This court established the foundational requirements for such evidence in *Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979). In *Bergner*, we held that when photographs are offered as substantive evidence, "there must be a strong showing of authenticity and competency . . ." established. *Id.* at 1017. The "silent witness" theory is a higher standard applicable in situations where no live person is available who can testify as to the accuracy and authenticity of the photograph, such that the photograph must "speak for itself" since it cannot be cross-examined. *Id.* at 1015.

Demonstrative evidence, on the other hand, has a lower standard for admissibility. Generally, photographs offered as demonstrative evidence are admissible when they are shown to be a true and accurate representation of the events they purport to illustrate. *Stuckman v. Kosciusko County Bd. of Zoning Appeals*, 506 N.E.2d 1079, 1082 (Ind. 1987). In addition, demonstrative evidence only needs to be "sufficiently explanatory . . . of relevant testimony in the case to be of potential help to the trier of fact." *Id.*

Akins argues that the videotape was admitted as a "silent witness" for substantive purposes, thus making the higher standard for admission applicable. We disagree. As we stated before, the higher "silent witness" standard is only applicable in situations where no one is available to testify regarding the video's authenticity and accuracy, thus leaving the video to "speak for itself." In the case at bar, however, Ostrander was present to testify as to the video's authenticity and accuracy. Ostrander identified Akins as the person recorded on the video, and she was able to independently describe his activities. She testified that she compiled the videotape and that it truly and accurately depicted the transaction that led to Akins' arrest. Ostrander also testified as to the maintenance of the video equipment. Last, Ostrander was available for cross-examination.

Moreover, the videotape involved here was offered as demonstrative, rather than substantive, evidence. The purpose of offering demonstrative evidence is to provide illustration and clarification. *Shepherd*, 690 N.E.2d at 324. First, the State elicited testimony from Ostrander regarding many of the videotaped events that occurred while she was dealing with Akins' transaction. Then, the security video was shown to the jury for the purpose of illustrating Ostrander's testimony. As the jury watched the videotape, she narrated the events as they occurred. As such, the tape was offered as demonstrative evidence to provide the jury with a more vivid depiction of the events that occurred, instead of leaving them to draw conclusions solely from Ostrander's words.

We conclude that the videotape was offered as demonstrative evidence and not as a "silent witness." Consequently, the more stringent standard established in *Bergner* does not apply here, and the standard applicable for the admission of demonstrative evidence is appropriate. We also conclude that the trial court did not abuse its discretion by admitting the videotape into evidence.



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### III. Admitting Hearsay as Course of Investigation of a Non-Police Officer

Next, Akins argues that a portion of Ostrander's testimony was inadmissible hearsay and constitutes reversible error because Akins' substantial rights were prejudiced. Akins asserts that the course of investigation principle does not apply here because Ostrander is a Wal-Mart employee and not a police officer. During testimony, Ostrander described to the jury Akins' behavior as Ireman had explained it to her. That testimony, Akins contends, constitutes inadmissible hearsay. We disagree.

The State counters Akins' argument by arguing that Ostrander's testimony was admissible because it was offered for the purpose of showing the course Ostrander took during her investigation. Moreover, the State advances this argument by comparing Ostrander's duties as a store manager who is investigating a suspicious merchandise return to those of a police officer who is conducting a criminal investigation. Because Ostrander was acting in a fashion similar to a police officer in such an investigation, the State contends, the testimony was admissible. We disagree with the State's position, as well.

Hearsay is defined as an out of court statement, "other than one made by the declarant while testifying at trial, and offered in evidence to prove the truth of the matter it asserts." Dixon, 869 N.E.2d at 519. When hearsay is admitted erroneously, reversal is appropriate only when the evidence prejudicially infringes upon the defendant's substantial rights. Hernandez v. State, 785 N.E.2d 294, 300 (Ind. Ct. App. 2003). Improperly admitted evidence constitutes harmless error, however, when substantial, independent evidence of guilt sufficiently supports the conviction such that there is no significant likelihood that the questionable evidence contributed to the conviction. Id.

Generally speaking, hearsay is not admissible. Vinson v. State, 735 N.E.2d 828, 832 (Ind. Ct. App. 2000). The State may, however, offer testimony that would otherwise be classified as hearsay to show the investigative steps taken by a police officer. Id. Testimony of this nature must remain within the confines of describing the course of investigation. Id.

Here, we hold that the trial court committed error when it allowed Ostrander's testimony over defense counsel's objection because Ostrander is not a police officer. As such, her testimony cannot be admitted to show the course of investigation taken by a police officer, thus, it was inadmissible hearsay. Nevertheless, the error is harmless and reversal is not appropriate because the introduction of the evidence did not prejudicially impact Akins' substantial rights. Rather, his conviction was supported by substantial independent evidence such that Ostrander's questionable testimony did not sufficiently contribute to his conviction.

Ostrander testified that Ireman told her that the video showed Akins walking into the store without a pressure washer. Ostrander had not seen the tape personally before she spoke to Ireman so she was testifying as to what Ireman had seen on the videotape. The videotape itself, however, was properly admitted into evidence. The jury saw that Akins entered the store without a pressure washer when



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the videotape was shown in court. Ostrander subsequently narrated the entire tape, including that portion, while the jury viewed it.

Furthermore, the stock research that Ostrander performed on the computer by checking the pick ticket and UPC number provides strong evidentiary support that Akins exerted unauthorized control over the power washer. Further, the computer did not produce a receipt which indicated that a power washer had been purchased from that particular store within the past six weeks. Consequently, Ostrander's testimony regarding what Ireman had seen on the tape did not have a significant impact on the jury such that it substantially contributed to Akins' conviction. Therefore, we conclude that the trial court committed harmless error when it allowed the State to admit hearsay for the purpose of showing the "course of investigation" by someone who is not a police officer.

### CONCLUSION

Based on the foregoing reasons, we conclude that the trial court properly admitted the security videotape into evidence and that the trial court committed harmless error when it allowed the State to admit hearsay for the purpose of showing "course of investigation" by someone who is not a police officer.

Affirmed.

MAY, J., concurs.

KIRSCH, J., concurs in result with opinion.

KIRSCH, Judge, concurring in result.

While I agree with my colleagues that the trial court erred in admitting the hearsay testimony and that such error was harmless, I part ways with them regarding their characterization of the videotape as demonstrative evidence. I believe -- and the State acknowledges -- that the tape was admitted for substantive, not demonstrative purposes. See Appellee's Brief, p. 9. ["The beginning of the videotape appears to have been admitted as substantive evidence . . . ."] The tape shows the defendant entering the store without a power washer in his possession, walking to the hardware department, and then pushing a shopping cart containing a power washer from the hardware department. Neither the sponsoring witness, nor any other witness at trial testified, or could testify, as to such matters. The videotape was, indeed, a "silent witness," and it was incumbent upon the State to make a sufficient showing of authenticity. See *Bergner v. State*, 97 N.E.2d 1012, 1015-6 (Ind. Ct. App. 1979). Because, I believe the State met its burden, and thus, the tape was properly admitted as substantive evidence, I concur in the result reached by my colleagues.

