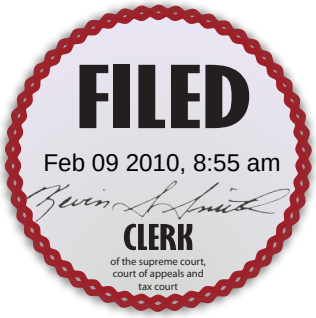

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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0906-CR-317
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-0706-FB-099731

FEBRUARY 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Timothy Taylor appeals his convictions of and sentences for robbery, a Class B felony, and intimidation, a Class C felony. We affirm.

ISSUES

Taylor raises four issues for our review, which we restate and renumber as:

I. Whether there was sufficient evidence to support Taylor's conviction of intimidation as a C felony.

II. Whether Chen's testimony was incredibly dubious.

III. Whether the trial court erred in granting the State's motion in limine.

IV. Whether the trial court abused its discretion in ordering consecutive sentences.

FACTS AND PROCEDURAL HISTORY

On May 30, 2007, Sufen Chen, the owner of a massage parlor called "Rejuvenescence," was in the back room of the business when she heard the bell on the front door ring. Chen came to the front room of the business and saw two people leaving in a hurry. One of the people, a very tall, thin black man, re-entered the business and asked for a massage. Chen told the man that he had to make an appointment. The man swung at Chen, pushed her, and pointed at his gun holster, telling Chen to be quiet. Chen saw a black gun in the holster.

The man then pushed Chen and a female employee onto the floor of another room. The man covered Chen and the employee with a towel and walked out of the room before

returning with a large man, later identified as Taylor. Taylor watched Chen and the employee while his partner searched the front room.

Taylor's partner, who was never identified, instructed Chen to come to the front room and open the cash register. Taylor and his partner took approximately $600 in cash from the register and the women's wallets.

Taylor told Chen that she would have to give him and his companion $1000 every Friday or "you won't be safe." (Tr. at 56). Taylor then made a hand gesture that Chen interpreted as a sign that he would kill her if she called the police.

After the men left the business, the women did not call the police because of their fear of reprisal from Taylor and his companion. However, when Chen informed her husband, Xiao Yang Gheng, of the threats, he told her to contact the police. The next day, Chen contacted the police department.

The Indianapolis police department informed Chen that she should shut down her business for a few days, as the department did not have sufficient personnel to work the case at that time. However, an officer did come and dust for prints. On June 1, 2007, Chen and Xiao were cleaning the closed store when Chen heard someone push on the locked front door. When Chen looked out, she saw that it was Taylor at the door. Taylor left but returned an hour later. Taylor asked Chen whether she was ready to pay "the one thousand," and Chen responded that she would have the money ready in about an hour. Xiao snuck out the back of the business and identified Taylor's car as a Silver Nissan with Connecticut plates. Xiao also made note of the license number.

Chen called the police and a detective came to the business. While the detective was at the store, Taylor called Chen about the money. Taylor told Chen to bring the money to a Walgreen's store on High School Road in Indianapolis.

Using the description of the car given by Xiao, Indianapolis officers saw Taylor's vehicle in the area, made a stop, and arrested him. Chen subsequently identified Taylor as the man who had been in her store on May 30, 2007. During the identification, Taylor again made the hand sign, indicating that he was pointing a gun at Chen. An officer saw the hand sign and identified it as a "shooting motion." (Tr. at 120).

After a jury found Taylor guilty of robbery, criminal confinement, and intimidation, the trial court sentenced Taylor to consecutive terms of twelve years on the robbery conviction (ten executed with two years probation) and four years on the intimidation conviction.[1] Taylor now appeals.

DISCUSSION AND DECISION

I. INTIMIDATION AS A C FELONY

In order to establish intimidation, the State must show that a person communicated a threat to another person with intent, among other things, to cause the other person to engage in conduct against her will. Ind. Code § 35-45-2-1(a). In order to establish that the offense is a Class C felony, the State must show that while committing the offense, the person draws or uses a deadly weapon. Ind. Code § 35-45-2-1(b)(2). A "threat"

[1] With the State's approval, the trial court vacated the confinement conviction because it was "the same act as the robbery." (Tr. at 239).

means "an expression, by words or action, of an intention" to "unlawfully injure the person threatened…." Ind. Code § 35-45-2-1(c)(1).

Here, the State charged Taylor as follows:

> Timothy J. Taylor, on or about May 30, 2007, did communicate to Sufen Chen, another person, a threat to commit a forcible felony, that is: he would kill her, with the intent that Sufen Chen engage in conduct against [her] will, that is: Sufen Chen would not contact the police, and while making said threat did draw or use a deadly weapon, that is, a second suspect possessed a handgun while the threat was being made.

(Appellant's App. at 112).

Taylor argues that he did not "use a deadly weapon" as defined in the statute and stated in the charging information. Specifically, he argues that (1) Chen's testimony about seeing a gun is too equivocal, (2) Taylor's partner was not in the room "using a deadly weapon" at the time the threat was made, and (3) conviction of intimidation under the circumstances of this case violates the rule that criminal statutes should be strictly construed. We address each argument below.

Our standard of review for sufficiency claims is well settled. In reviewing sufficiency of the evidence claims, this court does not reweigh the evidence or assess the credibility of witnesses. *Davis v. State*, 791 N.E.2d 266, 269 (Ind. Ct. App. 2003), *trans. denied.* We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences drawn therefrom. *Id*. at 269-70. The conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the trier of fact. *Id*. at 270.

First, we do not agree that Chen's testimony was insufficient to show that Taylor's partner had a gun. Although Chen originally testified that she saw a holster but not a gun, she later testified that when Taylor's partner pointed at the holster she saw a "black gun." (Tr. at 104). It was within the jury's province to decide the weight and credibility to be given to Chen's testimony, and the jury determined that Chen saw the gun. We will not usurp the jury's authority.

Second, we do not agree that the acts of Taylor and his partner were unconnected. While it is true that Taylor's partner had already pointed to the holster holding the gun and left the room when Taylor threatened Chen, the pointing at the holster holding the gun began the continuing act of intimidation. Taylor's continuation of the threat, communicated by a hand signal that Chen would be shot if she talked to the police, was given credence by Chen's realization that Taylor and his partner possessed the means to accomplish the threat.[2]

Third, we do not find that the trial court and the jury violated the rule that a statute should be strictly construed. It is true, as Taylor points out in his brief, that our legislature did not choose to use the phrase "armed with a deadly weapon" in subsection (b)(2) of the intimidation statute. Therefore, mere possession of a weapon does not support a conviction under the statute. However, the legislature did provide that the offense is a Class C felony when a defendant "uses a deadly weapon," and our supreme

[2] Even though a defendant is charged as a principal, he can be convicted as an accessory when it is clear that he and his partner acted in concert throughout a criminal episode. *Alvies v. State*, 905 N.E.2d 57, 61 (Ind. Ct. App. 2009); *Clark v. State*, 447 N.E.2d 1076, 1080 (Ind. Ct. App. 1983).

court has held that a person "uses a deadly weapon" under the statute when he reaches for or unsnaps a knife to accomplish his purpose of intimidating a woman into having sexual intercourse with him. *See Kuchel v. State*, 570 N.E.2d 910, 915 (Ind. 1991). In short, a person "uses a deadly weapon" when he or she employs the weapon to facilitate the offense.

In the present case, Taylor's partner pointed at the handgun holster, and Taylor used a hand signal to cause Chen to feel threatened that she would be killed if she called the police. The weapon, though not drawn or pointed, was used to facilitate the intimidation of Chen. Furthermore, the hand sign, which Chen acknowledged was "a hand sign like to make a gun" and which an officer later identified as "a shooting motion," emphasized the threat to Chen.[3]

The State presented sufficient evidence to support the conviction.

II. INCREDIBLE DUBIOSITY

During trial, Chen originally had trouble recognizing Taylor as the person who intimidated and robbed her. Later, however, she stated the following in answer to her counsel's questions:

> Q: And when I asked you before, I said, "Do you see the man who, one of the men who robbed you in court today,"
>
> A: Uh hmm.

[3] Taylor argues that he may have used a different "hand sign" at the time he made the threat than the hand sign acknowledged by Chen and the police officer. This is interesting speculation, but a reasonable jury could have determined that Taylor consistently used a "shooting motion" to intimidate Chen. Again, we will not usurp the jury's authority.

Q: and you expressed some doubt as to who that was,

A: Uh hmm.

Q: Can you explain why?

A: Because the days he dressed just like (unintelligible), tee-shirt, gray tee-shirt,

Q: Uh hmm.

A: um, it's about today, he look like, you know, dresses so nice,

Q: Okay.

A: 'cause that's why, totally different.

Q: Okay, but now, after you've taken time, you're completely confident,

A: Yeah.

Q: that that's the man.

A: I look for a few minute his face. I know now, his face.

(Tr. at 101-02)

Chen also originally stated that she saw the holster but did not see the handgun. Later, she stated the following in answer to her counsel's questions:

Q: Ms. Chen, you and I have discussed this topic and you said it was, the gun was held on his hip, right?

A: Uh hmm.

Q: But you knew that it was, do you know what… we had discussed about the difference between a Western style gun, like a cowboy would use, and a squared gun.

A: It look like not so long, (unintelligible).

Q: Okay. So, you did in fact, see a gun but it was also in the holster on his hip.

A: Right.

Q: And what was the color of the gun you saw?

A: Black.

(Tr. at 103-04).

Taylor claims that we should overturn his convictions because Chen vacillated in her testimony. He acknowledges that we usually refrain from reweighing evidence or judging the credibility of witnesses. *See Bradford v. State*, 675 N.E.2d 296, 298 (Ind. 1996). However, he points out that we may reverse convictions when confronted with testimony that is not persuasive and is "inherently improbable," "wholly uncorroborated," or exhibited "incredible dubiosity." *See Rogers v. State*, 422 N.E.2d 1211, 1213 (Ind. 1981).

Taylor's argument lacks merit. The "incredible dubiosity" rule applies where a sole witness presents testimony that is inherently improbable or coerced, equivocal, or wholly uncorroborated. *Carter v. State*, 754 N.E.2d 877, 880 (Ind. 2001), *cert. denied*, 537 U.S. 831, 123 S.Ct. 135, 154 L.Ed.2d 47 (2002). Incredibly dubious or inherently improbable testimony is that which runs counter to human experience and which no reasonable person could believe. *Campbell v. State*, 732 N.E.2d 197, 207 (Ind. Ct. App. 2000).

Here, Taylor's convictions are not based on incredibly dubious testimony. First, Chen unequivocally identified Taylor after he was stopped on the day of and near the place where he arranged to receive a payoff from Chen. Second, a reasonable person could be temporarily confused about the identity of a defendant who has "cleaned up" for his court appearance. Finally, the police were able to locate Taylor after Xiao identified his vehicle by make and color and his license plate by state and number. Inside the car was a cell phone that showed Taylor had contacted Rejuvenescence. Where a defendant has been unequivocally identified and subsequent confusion is caused by passage of time and a change of appearance, and where there is corroborating evidence, we will not overturn a conviction as incredibly dubious.[4]

III. EVIDENTIARY RULING

Prior to Taylor's trial, the State filed a motion in limine asking the court to exclude evidence regarding any reference to unlicensed or illegal commercial activity occurring at Rejuvenescence. At a pretrial hearing, the trial court granted the motion in limine "absent a showing that it's relevant and supported." (Tr. at 12). Taylor's attorney told the court that he would not attempt to cross-examine Chen on the issue because he did not expect her to admit to any illegal commercial activity. He continued, "However, I do expect the defendant to take the stand; I do expect that to be one of my first two or three questions. So, that's how the evidence would come in." *Id*. He requested an interlocutory appeal if the court refused to let him pursue this issue in his case in chief.

[4] As noted in our discussion of Issue I, we will not reweigh the jury's determination that Chen saw a black gun in the holster of Taylor's partner.

The trial court reaffirmed its grant of the motion in limine with the reminder that it would "reconsider it depending on how the evidence comes in." (Tr. at 13). The trial court also denied the motion to certify the question for interlocutory appeal.

The trial proceeded, and Taylor did not ask Chen any questions about the nature of her business. Taylor did not testify at trial, and thus he did not raise his defense that his contact with Chen was precipitated by illegal activity between Taylor and one of Chen's employees.

On appeal, Taylor argues that the court's pre-trial ruling deprived him of a chance to pursue a defense through cross-examination of Chen. However, a pre-trial ruling on a motion in limine is preliminary and is insufficient to preserve error for appeal. *Swaynie v. State*, 762 N.E.2d 112, 113 (Ind. 2002). Absent a ruling excluding evidence accompanied by a proper offer of proof, there is no basis for a claim of error. *Hollowell v. State*, 753 N.E.2d 612, 615-16 (Ind. 2001). The purpose of an offer of proof is to convey the point of the witness' testimony and provide the trial court with an opportunity to consider the evidentiary ruling. *State v. Wilson*, 836 N.E.2d 407, 409 (Ind. 2005).

Taylor did not attempt to cross-examine Chen regarding the nature of her business, thus failing to give the trial court the opportunity to consider a final evidentiary ruling of the matter. Taylor has waived the issue, as there is no basis for a claim of error.[5] Furthermore, had the trial court's ruling in limine been erroneous, it was invited when Taylor's attorney agreed that any evidence should come from Taylor instead of Chen. "A

[5] Taylor made a pre-trial offer of proof regarding what he would state in his testimony; however, no offer of proof was made regarding Chen's possible testimony.

party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error." *Hape v. State*, 903 N.E.2d 977, 997 (Ind. Ct. App. 2009), *trans. denied* (quoting *Booher v. State*, 773 N.E.2d 814, 822 (Ind. 2002)).

IV. SENTENCING

A person who commits a Class B felony may be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years. Ind. Code § 35-50-2-5. A person who commits a Class C felony may be imprisoned for a fixed term of between two and eight years, with the advisory sentence being four years. Ind. Code § 35-50-2-6(a). As noted in our statement of the facts, the trial court sentenced Taylor on the Class B felony robbery conviction to ten years executed with two years probation to follow. The trial court sentenced Taylor on the Class C intimidation to four years executed. The trial court ordered the sentences to be served consecutively. Taylor contends that the trial court abused its discretion in ordering the sentences.

When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). If the recitation includes a finding of mitigating or aggravating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*.

So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id*. One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including mitigating and aggravating circumstances, which are not supported by the record. *Id*. at 490-91. A court may also abuse its discretion by citing reasons that are contrary to law. *Id*. at 491.

Here, the trial court found as aggravating circumstances that Taylor had been convicted of a felony weapons charge in Michigan and that Taylor had committed an offense against Chen that was reprehensible under the circumstances. The trial court found that there were no statutory mitigating factors; however, the trial court also found mitigating factors of hardship to Taylor's adult family and general loss to the community of Taylor's education and skills during the time he was incarcerated. The court specifically stated that consecutive sentences were appropriate because of the "nature of the harm in this . . . matter." (Tr. at 264).

Taylor first claims that consecutive sentences are improper because, in his opinion, the aggravators and mitigators are in equipoise. Our examination of the sentencing record reveals that the trial court did not find the aggravators and mitigators to be in equipoise; indeed, the court clearly concluded that the aggravators outweighed the

mitigators. The relative weight or value assignable to aggravators and/or mitigators is not subject to review for abuse of discretion. *Anglemyer*, 868 N.E.2d at 491.

Taylor also claims that the trial court failed to specify its reasons for ordering consecutive sentences. However, our reading of the transcript discloses that the trial court went into great detail in describing its reasons for finding aggravators and mitigators. Within the context of this detail, the trial court determined that consecutive sentences were appropriate because of the nature of the crime. Specifically, the trial court agreed with the State that Taylor's crime was particularly heinous because he deliberately targeted immigrants that were unlikely to seek help from the police. In essence, Taylor was targeting those who could not defend themselves. Indeed, Taylor's actions were similar to those of organized crime demanding protection money. The court also emphasized that Taylor continued to threaten Chen after he was arrested and handcuffed by making the "shooting sign" at her. This action caused Chen to shut down her business and go into hiding for a time. The trial court did not abuse its discretion in finding that the particularized circumstances of the crime warranted consecutive sentences.

Affirmed.

RILEY, J., and MAY, J., concur.