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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY D. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0907-CR-332
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0808-MR-3

April 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Timothy D. Johnson appeals his conviction, after a jury trial, of murder.

We affirm.

ISSUES

1. Whether the trial court committed reversible error when it admitted testimony regarding statements by the victim.

2. Whether sufficient evidence supports the conviction.

FACTS

At some time late on June 18, 2007, in Fort Wayne, Johnny Green called Johnson, his cousin, from whom he had been purchasing crack for more than a year. Green wanted to purchase $40.00 worth of crack cocaine. When Johnson (accompanied by Gabe Mosley) met Green to deliver the crack cocaine, Green only had $30.00; nevertheless, Johnson sold him $40.00 of crack cocaine for the $30.00 – because he'd "been a good customer." (Tr. 260). Less than two hours later, Green called Johnson again; Green said he had $20.00 and wanted to purchase more crack cocaine. When Johnson (again accompanied by Mosley) arrived to deliver the crack cocaine, Green "only had five dollars. . . . [s]o [Johnson] asked him for his cell phone" in exchange for "forty worth" of crack cocaine. (Tr. 261, 262).

Green had been reselling some of the crack cocaine he purchased, and after Johnson acquired the phone, he was able to sell to Green's customers. Less than two hours after the second transaction, Green called Johnson again – saying "he had some

more money" and wanted more "crack cocaine." (Tr. 264). Johnson told Green where to meet him. Green arrived on his bicycle, "hopped off of it" at the corner of Drexel and Gaywood in Fort Wayne, and walked to meet Johnson and Mosley. (Tr. 267). When Johnson asked how much money he had, Green said he had no money but "needed" some crack cocaine on credit. (Tr. 268). Johnson said, "I can't do it no more." *Id.* Green demanded his cell phone back, and Johnson countered with a request for Green's bicycle. "[Green] said no." (Tr. 269). Johnson and Green argued, with Green "want[ing] the drugs," and Johnson refusing to "give him . . . more credit." (Tr. 272). A physical altercation ensued, and Mosley joined Johnson in fighting Green. Screaming, and with blood on his shirt, Green fled from Johnson and Mosley, who also ran away from the scene.[1]

Green had been stabbed fifteen times in his chest, abdomen, arms, leg, scalp, and back. Staggering, Green left a trail of blood, to the corner and then to the houses along Drexel. The blood trail showed that he approached several houses.

At the fifth house on Drexel, Stacey Curry and his nephew, Jerve Wright, were playing video games at approximately 3:00 a.m. when they heard a faint knock at the front door. Curry opened the door, and they saw Green bleeding and slouched against the door post. Greed told them his name and that he had been stabbed. As Green started to collapse, Curry caught him. Wright call the police, and Curry tried to staunch Green's bleeding with towels. Repeatedly, Green said that "they" had "stabbed [him]," and asked

[1] The foregoing facts were testified to by Johnson.

whether "they" were coming after him. (Tr. 119). As Green struggled to breathe and blood oozed from multiple wounds, "he still kept on saying, are they coming and that he was going to die. . . . he just kept on saying that." *Id.*

Within five minutes, Fort Wayne Police Department Officer Jason Fuhrman arrived at the Curry house in response to a reported stabbing. He found Green lying on the front porch, bloody and having difficulty breathing. Fuhrman lifted Green's shirt and saw multiple stab wounds to his chest and abdomen; he asked what had happened. Green answered, "They tried to take my bike." (Tr. 134). After eliciting Green's name and age, Fuhrman asked "how many people there were," and Green "held up two fingers." *Id.* Fuhrman observed that Green was "going downhill." (Tr. 134). Fuhrman "asked him if they were black," and Green "nodded." (Tr. 135). Officer David Wilkins had also responded, and observed Green lying on the porch, his shirt "covered in blood" and "a lot of blood on the . . . porch." (Tr. 143). Wilkins "could hear that he was having problems breathing." *Id.*

Medics arrived and transported Green to the hospital. Shortly thereafter, he died as a result of multiple stab wounds to the chest and abdomen.

The "day after [his] son got killed," Green's father was contacted by his nephew – Johnson's father – and asked "to come over." (Tr. 150). There, Johnson "didn't want to talk" but Johnson's father "told him, 'go on, tell him.'" (Tr. 153, 154). Johnson told Green's father that Johnson had wanted Green's bike; Green refused to give it to him;

"[t]hey got into it"; Green "choked" Johnson; and then some "other boy was stabbing [Green]." (Tr. 151).

On May 15, 2008, Detective James Seay interviewed Johnson. Johnson stated that Green had wanted his cell phone back, got mad, grabbed Johnson, and started choking him. Johnson further stated that Green then grabbed Mosley as well, and the three had gone to the ground and "tussl[ed]" for approximately thirty seconds. (Ex. 38). Johnson admitted to Seay that Mosley had stabbed Green, but insisted that he had not seen him stab Green or even seen him have a knife.[2]

On August 5, 2008, the State charged Johnson with murder, alleging that "while acting in concert with Gabe Mosley," he "did knowingly or intentionally kill . . . Green." (App. 13). It further charged Johnson with felony murder (while committing or attempting to commit robbery), and attempted robbery, as a class A felony.

On September 17, 2008, Johnson filed a motion in limine, seeking to exclude Green's statements made to Curry, Wright, and Officer Fuhrman as hearsay or a violation of his Sixth Amendment right to confrontation. The trial court held a hearing on November 24, 2008. Curry, Wright, and Fuhrman testified consistent with their trial testimony reflected above. The trial court, in a written order that same day, found that Green's statements were "exceptions to hearsay being excited utterances and/or dying declarations." (App. 22). It further found that Green's statements did "not violate confrontation as described in *Crawford v. Washington*," 541 U.S. 36 (2004). *Id.* at 23.

[2] At trial, Johnson testified that Mosley had stabbed Green but that he had not seen him stab Green or seen him have a knife.

At trial, on June 2-3, 2009, Johnson renewed his objection as expressed in the motion in limine, and the trial court reaffirmed its earlier ruling. The jury found Johnson guilty of murder; it was unable to reach a verdict on the felony murder or attempted robbery charges.[3]

DECISION

1. Admission of Evidence

The trial court has inherent discretionary power in the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court's decision regarding the admissibility of evidence is reviewed only for an abuse of that discretion. *Id.*

Johnson argues that the trial court erred in admitting Officer Fuhrman's testimony regarding Green's statement "either as an excited utterance or a dying declaration." Johnson's Br. at 3.[4] He states his intention to first "address whether the statement to the officer was properly admitted as an exception of the hearsay rule," but then notes the lack of any

> dispute over the victim's condition when he spoke with the officer. He had been stabbed numerous times. He was bleeding and covered with blood. He was hurt and frightened. He died at the hospital soon afterwards. It is hard to argue that the victim's statement to the officer wasn't done under the stress caused by the stabbing or when he thought he was dying.

[3] A mistrial was declared in this regard, and the two charges were later dismissed on the State's motion.

[4] Johnson "concedes that [Green]'s statements to Stac[e]y Curry and Jerve Wright were excited utterances and admissible into evidence as exceptions to the hearsay rule." Johnson's Br. at 7.

Id. at 7-8. As best we understand, Johnson argues that despite this being the standard for an excited utterance exception, *see* Ind. Evidence Rule 803(2), such cannot stand as "reliable evidence" because the admission of Green's statement that "[t]hey tried to take my bike," (tr. 134), leaves "the jury to speculate as to what Johnson's involvement may have been." *Id.* at 8.

We do not find this argument to establish reversible error. "Errors in the admission of evidence are to be disregarded as harmless error unless they affect the substantial rights of the party." *Turben v. State*, 726 N.E.2d 1245, 1247 (Ind. 2000). To determine whether an error in the admission of evidence affected the appellant's substantial rights, we assess the probable impact of that evidence upon the jury. *Id.* The erroneous admission of evidence is harmless – *i.e.*, it "does not affect [the defendant's] substantial rights," and "does not warrant reversal" – when "the probable impact of the error on the jury, in light of all the evidence," was minor, and the admissible evidence "was sufficiently strong." *Bald v. State,* 766 N.E.2d 1170, 1173 (Ind. 2002) (citing *Hauk v. State*, 729 N.E.2d 994, 1002 (Ind. 2000)).

Both Curry and Wright's testimony – which Johnson expressly accepts as properly admitted – recounted Green's use of the word "they" when he referred to his stabbing. (Tr. 117, 118, 119, 122, 124, 127). The jury heard testimony regarding Johnson's statement made to Green's father and his testimony at trial where he admitted that the physical altercation with Green involved a dispute over Green's bike. Hence, in addition to the cited testimony by Fuhrman of Green's statement, "They tried to take my bike," (tr.

134), substantial additional evidence supported the jury's reasonable inference that Johnson participated in the murder, which occurred as a result of a dispute over Green's bike. Therefore, we could find no reversible error in this regard.

Continuing to focus on Fuhrman's testimony that Green said, "They tried to take my bike," (tr. 134), Johnson further argues that even "if the statement is an excited utterance[,] it is testimonial and therefore inadmissible." Johnson's Br. at 10. He cites to *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). *Crawford* held "that the Confrontation Clause requires that a defendant have the opportunity to confront the witnesses who give testimony against him, except in cases where an exception to the confrontation right was recognized at the time of founding." *Giles v. California*, __U.S. __, 128 S. Ct. 2678, 2682 (2008). Subsequently, in *Giles*, the U.S. Supreme Court noted that a testimonial statement was "admitted at common law even though [it was] unconfronted" if it was a "declaration[] made by a speaker who was both on the brink of death and aware that he was dying." *Id.* (citing *King v. Woodcock*, 1 Leach 500, 501-504, 168 Eng. Rep. 352, 353-354 (1789); *United States v. Veitch*, 28 F. Cas. 367, 367-368 (No. 16,616) (CC DC 1803); *King v. Commonwealth*, 4 Va. 78, 80-81 (Gen. Ct. 1817)). Hence, in *Giles*, the U.S. Supreme Court confirmed that a dying declaration was "an exception to the confrontation right," *id.*, and its admission did not violate the Confrontation Clause.

The evidence established that within a few minutes of Officer Fuhrman's arrival, Green had repeatedly stated to Curry that he was dying. Blood was oozing from multiple

stab wounds to his chest and abdomen, and Green's breathing became increasingly difficult. Green died very shortly after making his statements to Curry and Fuhrman. Accordingly, we find that the trial court did not abuse its discretion when it admitted Fuhrman's testimony as part of Green's dying declaration, "They tried to take my bike." (Tr. 134).

2. Sufficiency of the Evidence

> When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted). Further, circumstantial evidence is sufficient for a conviction if inferences may reasonably be drawn that allowed the jury to find the defendant guilty beyond a reasonable doubt. *Pelley v. State*, 901 N.E.2d 494, 500 (Ind. 2009).

Johnson argues that the evidence "was insufficient to establish that [he] stabbed and killed the victim." Johnson's Br. at 4. We disagree.

The State charged that "while acting in concert with Gabe Mosley," Johnson had "knowingly or intentionally kill[ed]" Green. (App. 13). As the trial court instructed the

jury, "A person who knowingly or intentionally aids, induces, or causes another person to commit an offense, commits that offense . . . ." (App. 46, quoting Ind. Code § 35-41-2-4). "[T]he trier of fact may infer intent to kill from the use of a deadly weapon in a manner likely to cause death or great bodily harm." *Kiefer v. State*, 761 N.E.2d 802, 805 (Ind. 2002). According to Johnson's own testimony, Mosley was with Johnson during two earlier interactions with Green involving the sale and delivery of crack cocaine, and was with him for the third interaction which Johnson had expected to involve another delivery of crack cocaine. Johnson further testified that when the third interaction developed into a physical confrontation between himself and Green, Mosley entered the fray against Green. As he lay dying on Curry's front porch, Green repeatedly said that "they" had stabbed him. Green suffered fifteen stab wounds; photographs of his injuries depict that several wounds were to his stomach and abdomen; and his death resulted from the multiple stab wounds to his chest and abdomen. Despite Johnson's denial of having personally stabbed Green, or having seen Mosley do so, his presence with Mosley and their joint participation in the physical altercation with Green, Mosley's presence on each occasion when Johnson met with Green to deliver cocaine, and the nature and extent of Green's grievous stab wounds and near-immediate death after the fight was over, provided sufficient probative evidence to support the jury's reasonable inference that Johnson knowingly or intentionally killed Green.

Affirmed.

BAKER, C.J., and CRONE, J., concur.