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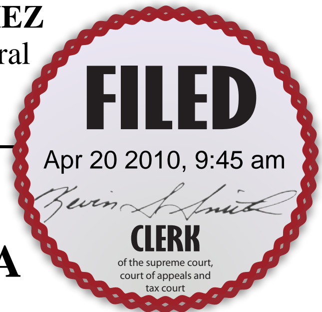

IN THE COURT OF APPEALS OF INDIANA

LUCIO HERNANDEZ HINOJOSA,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 79A02-0907-CR-595
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy J. Williams, Judge
Cause No. 79D01-0807-FB-23

April 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Lucio Hernandez Hinojosa was convicted of robbery and confinement, both Class B felonies for being armed with a deadly weapon, and theft, a Class D felony, and was found to be an habitual offender. Hinojosa appeals his convictions, raising two issues: 1) whether there is sufficient evidence of a deadly weapon to support the robbery and confinement convictions as Class B felonies, and 2) whether his convictions of robbery and theft violate principles of double jeopardy. Concluding there is sufficient evidence Hinojosa was armed with a deadly weapon, we affirm his convictions for robbery and confinement as Class B felonies. Also concluding his theft conviction is a lesser-included offense of his robbery conviction, however, we reverse and remand for the trial court to vacate the theft conviction.

Facts and Procedural History

On July 11, 2008, Deanna Duncan was working the 3 p.m. to 11 p.m. shift at a Village Pantry store in Lafayette, Indiana. A few minutes before 11 p.m., a male customer entered the store, brought a Pepsi to the register, and requested a carton of Newport cigarettes. After Duncan retrieved the cigarettes and rang up the purchase, the customer "showed [her] a gun" and said he wanted the money in the register. Transcript at 117. Duncan told the customer there was no money in the register, but he "pulled the gun out," id., so she emptied the cash tray and then, at his insistence, lifted the cash tray from the drawer to show him there was no money underneath. While this was occurring, Richard Higley, another employee of the Village Pantry who was scheduled to work the 11 p.m. to 7 a.m. shift, entered the store. The customer turned away from the register

toward Higley, who was approaching him from behind, showed Higley the gun, and told him to back up and stay put. Higley did as he was told. The customer took the money and the merchandise and left the store.

Duncan and Higley then "went to protocol," id. at 26, locking the doors, displaying the "closed" sign, and calling the police and their boss. Cathy Guess, Village Pantry manager, arrived at the store and did an audit, determining that approximately $50 in merchandise and $130 in cash had been taken. She also viewed with police officers the security video of the incident and burned a CD of the footage for police. Police took Duncan and Higley's statements, but neither recognized the customer. Both Duncan and Higley testified they believed the gun the customer displayed was real and they complied with his demands because they were fearful of the gun.

Eventually, Hinojosa was identified as the suspect. People who knew Hinojosa, including his girlfriend and his girlfriend's mother, identified him from still photos captured from the security video. Hinojosa gave a statement to police in which he admitted the robbery but claimed the gun he displayed was a toy, a BB gun from which he had broken off the orange tip. State's Exhibit 4a. Hinojosa threw the gun away after leaving the Village Pantry; it was never recovered.

The State charged Hinojosa with robbery while armed with a deadly weapon, a Class B felony, theft, a Class D felony, and criminal confinement while armed with a deadly weapon, a Class B felony. He was also alleged to be an habitual offender. Hinojosa was tried to the bench, and the trial court found him guilty of the substantive

offenses as charged and also found him to be an habitual offender. Hinojosa now appeals his convictions.

Discussion and Decision

I. Sufficiency of Evidence

A. Standard of Review

Hinojosa argues insufficient evidence supports his convictions of robbery and confinement with a deadly weapon. Our standard of review for sufficiency of the evidence claims is well settled:

> When reviewing the sufficiency of the evidence to support a 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 elements of 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, footnotes, and citations omitted) (emphasis in original).

B. Evidence of a Deadly Weapon

To convict Hinojosa of robbery as charged, the State was required to prove beyond a reasonable doubt that Hinojosa knowingly or intentionally took property from Duncan by using or threatening the use of force or by putting Duncan in fear while armed with a handgun. See Ind. Code § 35-42-5-1; see also Appellant's Appendix at 11 (information charging Hinojosa with robbery "by using or threatening the use of force or by putting

[Duncan] in fear, committed while armed with a deadly weapon, to wit: a handgun"). To convict Hinojosa of confinement as charged, the State was required to prove Hinojosa knowingly or intentionally confined Higley without Higley's consent or removed him from one place to another by force or threat of force while armed with a handgun. See Ind. Code § 35-42-3-3; see also Appellant's App. at 13 (information charging Hinojosa with "confin[ing] [Higley] without his consent or remov[ing] [Higley] by force or threat of force from one (1) place to another, . . . committed . . . while armed with a deadly weapon, to wit: a handgun").

Based on Indiana Code section 35-41-1-8, there are two categories of "deadly weapons": (1) firearms and (2) items capable of causing serious bodily injury. Indiana Code section 35-47-1-6 defines a "handgun" as "any firearm designed or adapted so as to be aimed and fired from one (1) hand . . .; or any firearm with a barrel less than sixteen (16) inches . . . or an overall length of less than twenty-six (26) inches." Therefore, a handgun falls into the firearm category of deadly weapons. Hinojosa contends there was insufficient evidence that the gun he displayed was a firearm, citing Miller v. State, 616 N.E.2d 750 (Ind. Ct. App. 1993). In Miller, the defendant was charged with confinement and criminal recklessness while "armed with a deadly weapon, a handgun." Id. at 753 n.4. Thus, the State limited the charges to the illegal use of a firearm. The evidence at trial, however, was that the defendant's gun was a pellet gun rather than a handgun. Although a pellet gun might be a deadly weapon in that it is capable of causing serious bodily injury, the State's proof failed to show the pellet gun was a firearm[1] and the court

[1] "Firearm" is defined as a weapon capable of expelling, designed to expel, or readily convertible to expel a projectile by means of an explosion. Ind. Code § 35-47-1-5. Neither a pellet gun nor a BB gun is a firearm. See

held there was insufficient evidence to support convictions of the crimes with which he was charged. Id. at 756.

In this case, the gun Hinojosa used in the robbery was never found. Hinojosa claimed in his statement to police that it was a toy BB gun. Duncan, the Village Pantry cashier Hinojosa first confronted, testified she has prior military experience and she did what Hinojosa told her to do because she believed the gun he pointed at her was real and she was scared and did not want Hinojosa to hurt her. Higley, the Village Pantry cashier who entered the store during the robbery, testified he saw the gun from approximately four or five feet away and believed it looked like a 9 millimeter gun or a 45 caliber gun, "because my Dad owns a 45 and they look somewhat similar." Tr. at 23. Higley did what Hinojosa told him to do because he thought the gun was real and he was in fear for his and Duncan's lives. Detective Jeremy Rainey, who investigated the case and has eleven years experience in law enforcement, testified that the object in Hinojosa's hand in a still photograph made from the video of the robbery appears to be a handgun. Finally, Officer Michael Roberts of the Lafayette Police Department was tendered without objection as an expert in the area of firearms. Officer Roberts testified, based upon his review of the video of the robbery and a still photograph made from that video, that the object in Hinojosa's hand was a handgun. Officer Roberts explained his primary reason for believing the object to be a handgun is that it appeared to have the same characteristics as a Sig Sauer P220 handgun he once had. The video and the still

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Mitchem v. State, 685 N.E.2d 671, 677 (Ind. 1997) (pellet gun); Davis v. State, 835 N.E.2d 1102, 1112 (Ind. Ct. App. 2005) (BB gun), trans. denied.

photographs captured from the video were entered into evidence and viewed by the trial judge sitting as the finder of fact.

Because Hinojosa disposed of the gun used during the robbery, there is no indisputable evidence of the nature of the gun, as in Miller. In Miller, the State alleged one fact but proved another. Here, the State alleged Hinojosa was armed with a handgun and presented evidence to prove that fact. This case is therefore akin to B.K.C. v. State, 781 N.E.2d 1157 (Ind. Ct. App. 2003), in which a juvenile was charged with robbery while armed with a handgun, a Class B felony if committed by an adult. The weapon was never recovered, and the evidence regarding the nature of the weapon conflicted. The juvenile claimed the weapon was a BB gun, but a witness testified the gun she saw "looked 'kind of, sort a' like a real gun." Id. at 1164. Had the evidence conclusively proven the gun was a BB gun, Miller would have applied. Id. Because the evidence was in dispute, however, the juvenile's argument was merely an invitation to reweigh the evidence and reassess the credibility of the witnesses, and the adjudication was affirmed. Id. As in B.K.C., Hinojosa claimed the gun was a toy gun, whereas the witnesses present at the scene testified the gun appeared to be a real handgun when Hinojosa showed it to them and two police officers testified the object appeared to be a real handgun on video and in still photographs. Hinojosa's argument asks us to reweigh the evidence, which we will not do. See Drane, 867 N.E.2d at 146. The State presented sufficient evidence from which the trier of fact could reasonably infer Hinojosa was armed with a handgun when he committed these crimes.

II. Double Jeopardy

Hinojosa also contends his convictions for robbery and theft, based upon the taking of the same property, violate Indiana's double jeopardy clause, which provides that "[n]o person shall be put in jeopardy twice for the same offense." Ind. Const. Art. 1, § 14. Although Hinojosa raises this as a constitutional claim, we can decide the issue based on Indiana Code section 35-38-1-6, which provides: "Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense." See Johnson v. State, 749 N.E.2d 1103, 1109 (Ind. 2001) ("We need not decide this issue on Indiana constitutional grounds because Indiana Code section 35-38-1-6 specifically addresses this concern . . . .").

Hinojosa was charged with robbery for taking "U.S. currency and/or merchandise" from Duncan. Appellant's App. at 11. He was also charged with theft for taking "merchandise belonging to the Village Pantry." Id. at 12. The State concedes the "merchandise" referenced in each charge was the same merchandise – a Pepsi and a carton of cigarettes – taken at the same time from the same person and that the theft charge is a lesser-included offense of the robbery charge. See Brief of Appellee at 9 (citing Johnson, 749 N.E.2d at 1109-10). Accordingly, Hinojosa's theft conviction and the sentence thereon must be vacated.

Conclusion

There is sufficient evidence Hinojosa was armed with a handgun when he committed the robbery and confinement, and his convictions of those crimes as Class B

felonies are therefore affirmed. His theft conviction cannot stand, however, as it is a lesser-included offense of his robbery conviction, and we remand for the trial court to vacate the conviction and sentence for theft.

Affirmed in part, reversed and remanded in part.

FRIEDLANDER, J., and KIRSCH, J., concur.