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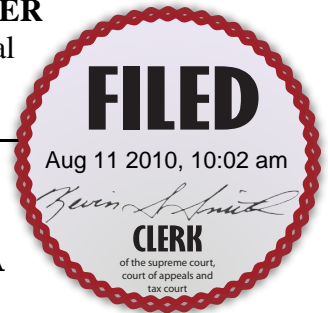
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**IN THE
COURT OF APPEALS OF INDIANA**

DEVON STERLING,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-0910-CR-606

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-0706-MR-105725

August 11, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Devon Sterling appeals following his conviction for Murder,¹ a felony. Specifically, Sterling argues that the trial court erred by admitting his statement to police into evidence. In addition, Sterling contends that the trial court abused its discretion by admitting the following evidence: (1) his testimony from his first trial; (2) a .40-caliber bullet and casings found near the crime scene; and (3) a prior incident involving Sterling and the victim. Lastly, Sterling argues that the trial court abused its discretion when it excluded evidence regarding another suspect. Finding no reversible error, we affirm the judgment of the trial court.

FACTS

On June 8, 2007, Sterling was attending the same neighborhood block party as the decedent, Dewayne Butts. Several months before, there had been a dispute between Dewayne and Sterling's father concerning the ownership of a dog that, at the time, Dewayne had at his mother's home. A physical argument ensued between Dewayne and Sterling's father, and the dog was given to the Sterlings. Because of this prior confrontation, both Dewayne and his girlfriend, Marie Ball, were familiar with Sterling at the time of the block party.

Before leaving the block party, Dewayne and Sterling had a tense encounter and had to be separated by Marie. Dewayne and Marie headed to her vehicle, accompanied by Marie's daughter, DeAsia, and Dewayne's mother, Judy Butts, and her niece, Rockita Brown. Before leaving, while all five were seated inside Marie's vehicle, Dewayne and

¹ Ind. Code § 35-42-1-1.

Marie were both shot multiple times. The shooter, standing outside the passenger's window, was later identified by both Marie and Rockita as Sterling. Dehaven Butts, who was standing near the vehicle at the time of the shooting, identified Sterling as the man he witnessed running from the vehicle in the moments after the shooting. Dewayne died as a result of the gunshot wounds.

Sterling turned himself into police on June 10, 2007, and was accompanied by his family, who had retained counsel for him. Detective David Labanauskas was aware that they were awaiting the arrival of counsel, but the interrogation proceeded when Detective Labanauskas learned that the attorney had been delayed. The State subsequently charged Sterling with the murder of Dewayne and the attempted murder of Marie.

The case proceeded to a jury trial on September 29, 2008, during which Sterling testified about the dog incident, a .40-caliber gun he owned, and an asserted alibi defense that he subsequently withdrew at a second trial. The trial court resulted in a hung jury, and a mistrial was declared.

A new trial commenced on July 20, 2009. Sterling's motion to suppress the statement he made to the police was denied before the second trial. The second trial court admitted Sterling's statement to Detective Labanauskas, along with a redacted version of Sterling's testimony from the first trial, evidence of the .40-caliber bullet and casings found in the vicinity of the crime, and evidence of the dog incident. However, the trial court did not allow Sterling to introduce evidence of another suspect.

At Sterling's second trial, Marie and Rockita both identified Sterling as the shooter with 100% certainty. In addition, Dehaven testified that he was certain he saw

Sterling fleeing the scene in the moments after the shooting. On July 23, 2009, the jury found Sterling guilty of murder and not guilty of attempted murder. Sterling now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The admissibility of evidence is within the broad discretion of the trial court. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002). In reviewing the trial court's decision to admit evidence, we will only consider the evidence in favor of the trial court's ruling and unrefuted evidence in the defendant's favor. Id. The trial court abuses its discretion if the decision to admit the evidence is clearly against the logic and effect of the facts and circumstances before the court. Id. However, even if a trial court errs in ruling on the admissibility of evidence, the decision will not be reversed absent a showing that the error is inconsistent with substantial justice, denying the defendant a fair trial. Id.

II. Statement to Police, Testimony from First Trial, .40-Caliber Bullet and Casings

Sterling first contends that the trial court erred when it admitted into evidence the statement he gave to Detective Labanauskas on June 10, 2007. Sterling alleges that the admission of the statement violated his right to counsel and violated his right to remain silent.

Next, Sterling argues that the trial court abused its discretion in admitting his prior testimony into evidence at the second trial. A redacted form of this testimony was played

for the jury in the second trial over objection. Sterling contends that this violated his rights under the Fifth and Sixth Amendments to the United States Constitution.

Further, Sterling argues that the trial court abused its discretion in admitting evidence of the .40-caliber bullet and casings found near the crime scene. Before trial, Sterling filed a motion in limine, arguing that this evidence was irrelevant. On appeal, he contends that the admission of this evidence was error because it was irrelevant and unduly prejudicial.

We will assume solely for argument's sake that the trial court erred in admitting Sterling's statement to police, his testimony from his first trial, and evidence of the .40-caliber bullet and casings. Those errors, however, were harmless in light of the fact that two people, Marie and Rockita, both of whom were acquainted with Sterling and were in the vehicle during the shooting, identified Sterling as the shooter with 100% certainty. Specifically, Marie and Rockita were seated inside the vehicle with the victim and testified that Sterling was standing right outside the vehicle's window when he fired the shots. Tr. pp. 100-02, 359-60, 372. Furthermore, Dehaven, a third witness, identified Sterling as the man he witnessed fleeing the scene in the moments after the shooting. Id. at 363, 473-75.

Sterling attempts to divert our attention from this evidence by highlighting his acquittal in the attempted murder charge. However, we do not find this argument compelling because it is well established that juries consider each of the charges against the defendant separately, and it is not uncommon for a jury to find a defendant guilty of some charges and not guilty of others.

Even considering the totality of these alleged errors, we cannot conclude that Sterling was denied a fair trial because of the overwhelming eyewitness testimony supporting his conviction. In other words, any alleged error did not prejudicially contribute to Sterling's conviction and, therefore, is harmless. Standifer v. State, 718 N.E.2d 1107, 1110 (Ind. 1999) (finding that the trial court erred pertaining to the defendant's Sixth Amendment right to confront witnesses but affirming the trial court because the errors were harmless in light of the other evidence). We decline to reverse on this basis.

III. The Dog Incident

Next, Sterling contends that the trial court abused its discretion when it admitted evidence concerning the dog incident. Sterling moved to exclude testimony regarding the dog incident, but the trial court denied the motion. In arguing that this evidence is both irrelevant and prejudicial, Sterling focuses on the date of the dog incident and the fact that he and Dewayne had seen each other since that event without incident.

Evidence is relevant, and thus admissible, when it has the tendency to make the existence of any fact of consequence to the trial's outcome more or less probable. Ind. Evidence Rule 401, 402. Still, relevant evidence may be excluded "if its probative value is out-weighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ind. Evidence Rule 403.

Sterling contends that evidence of the dog incident is a red herring because he and Dewayne had been around each other since that event without a confrontation, but we disagree. The prior incident is relevant to the case at bar because it had occurred only six

months before Dewayne's murder and illustrates the hostility that existed between Sterling and Dewayne. Further, the record shows that this hostility was ever-present at the block party in the minutes leading up to Dewayne's murder. Marie testified that she inserted herself between the two men and pushed them apart. Tr. pp. 350-52. Finally, Marie testified that the reason she was familiar with Sterling was because of the earlier dog incident. Id. at 341-45, 395-402.

Under these circumstances, the trial court did not abuse its discretion in admitting this evidence because it was relevant to Sterling's motive to harm Dewayne. Moreover, even if the trial court erred in admitting this evidence, there is such overwhelming evidence of Sterling's guilt - two testimonies that Sterling undoubtedly was the shooter and one testimony that he was fleeing the crime scene - that the error would be harmless. Standifer, 718 N.E.2d at 1110.

IV. Another Suspect

Finally, Sterling argues that the trial court abused its discretion in excluding evidence of another suspect. Sterling claims that, as a result, he was unable to present a complete defense, a right guaranteed to him by the Sixth Amendment to the United States Constitution.

Sterling's proposed theory of defense relating to another suspect stems from an instance involving Tommy Warren. In 2003, Dewayne was charged with the attempted murder of Warren; however, the case was ultimately dismissed. Sterling contends that Marie could testify to witnessing "some type of stare-off" between Warren and Dewayne in 2006, when Dewayne asked Warren, "do you got a problem with me? If you do, take

it out, we'll settle it in the streets, or take it out in the streets.” Tr. p. 19. Sterling also notes that an officer at the scene of Dewayne’s murder reported that he overheard a female say that Warren “did it.” Id. at 17-19; Defendant’s Exs. A-D. To further promote the idea that Warren is a suspect, Sterling directs our attention to a single Crime Stoppers tip after Dewayne’s death that listed Warren as a suspect. The defense in this case subpoenaed Warren, and he refused to testify, citing his right not to incriminate himself under the Fifth Amendment to the United States Constitution

The Sixth Amendment to the United States Constitution guarantees that a defendant in a criminal proceeding has the right to present a defense. U.S. Const. amend. VI. Before evidence of a third party is admissible for use in a defense, however, the defendant must sufficiently connect the third party to the crime and demonstrate that the excluded evidence could have established motive and opportunity. McGaha v. State, 926 N.E.2d 1050, 1053-54 (Ind. Ct. App. 2010), trans. denied.

Sterling directs our attention to a case in which the third party’s motive and opportunity are beyond evident. In Joyner v. State, the third-party was having a sexual affair with the victim at the time of the crime, worked with the victim, argued with the victim the day she disappeared, was late to work, and lied about it, the day after the victim disappeared. Joyner v. State, 678 N.E.2d 386, 389-90 (Ind. 1997).

We find Joyner easily distinguishable and instead conclude that the instant appeal is far more analogous to cases in which specific factual evidence is lacking concerning another possible suspect. Lashbrook v. State, 762 N.E.2d 756 (Ind. 2002); Pelley v. State, 901 N.E.2d 494 (Ind. 2009). In Lashbrook, we found that the trial court properly

excluded evidence that the third party allegedly said on a prior occasion that the victim “was gonna die.” Lashbrook, 762 N.E.2d at 758. And in Pelley, we found it proper to have excluded hearsay evidence that someone with whom the victim had a past association also had a motive to murder him. Pelley, 901 N.E.2d at 505-6. In sum, where, as here, there is no material evidence that the third party is connected to the crime, the trial court does not abuse its discretion in refusing to admit the proffered evidence. Lashbrook, 762 N.E.2d at 758.

Here, Sterling fails to present material evidence that directly connects Warren to the crime, instead presenting us with unfounded and speculative information: an anonymous woman overhead saying Warren “did it” and one Crime Stoppers tip. Consequently, the trial court did not err in excluding this evidence. Even if the trial court had erred, it would have been harmless beyond a reasonable doubt because it would not have contributed to the verdict obtained given the above-discussed evidence supporting the conviction. Standifer, 718 N.E.2d at 1110.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.