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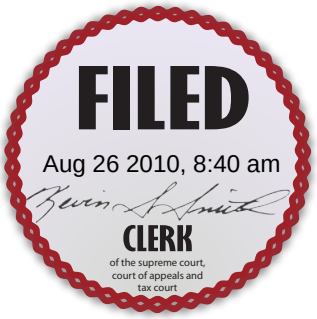

ATTORNEY FOR APPELLANT:

P. JEFFREY SCHLESINGER
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

PIERRE E. TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0912-CR-730
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0712-MR-12

August 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Pierre E. Taylor appeals his convictions and 175-year aggregate sentence for murder, a felony, and four counts of attempted murder, all class A felonies. We affirm.

Issues

I. Did the trial court abuse its discretion in admitting the prior testimony of a witness who failed to appear at trial?

II. Are Taylor's attempted murder convictions supported by sufficient evidence?

III. Did the trial court abuse its discretion in striking the final sentence of Taylor's tendered jury instruction regarding recklessness?

IV. Is Taylor's sentence inappropriate in light of the nature of the offenses and his character?

Facts and Procedural History

The facts most favorable to the jury's verdict indicate that on the evening of December 28, 2007, Shakira Best and her friends hosted a party at a Merrillville hotel. Rodney Woods drove from Indianapolis to attend the party, and he socialized with Taylor and several other acquaintances. Lawrence Gardner, John Boyd, Lewis Miller, David Sturdivant, Laronn Carey, and Karnell Price arrived at the party after Woods and Taylor. Gardner informed his companions that Taylor had a gun and urged them to leave. Gardner's group left the room and walked down the hallway, followed by Best. Woods, Taylor, and several others followed them. Gardner's group and Best entered an elevator. Woods threw a punch at someone in the elevator, who responded in kind. Taylor brandished a .45-caliber semiautomatic pistol and fired at least twelve jacketed hollow-point bullets into the elevator,

striking Gardner, Boyd, Sturdivant, Price, and Best. Boyd was shot five times and later died from his wounds.

The State charged Taylor with murdering Boyd and attempting to murder Gardner, Sturdivant, Price, and Best. Taylor's first trial ended in a hung jury in June 2009. On October 23, 2009, at the conclusion of his second trial, the jury found Taylor guilty as charged. On November 19, 2009, the trial court sentenced Taylor to consecutive terms of fifty-five years on the murder conviction and thirty years on each of the attempted murder convictions, for an aggregate sentence of 175 years. Taylor now appeals.

Discussion and Decision

I. Unavailability of Witness

Rodney Woods testified at Taylor's first trial in June 2009. Woods described the encounter with Gardner and his companions at the hotel, admitted that he "took a swing" at someone in the elevator, and stated that Taylor "shot a few times" into the elevator. Tr. at 542, 543. The jury was selected for Taylor's second trial on Monday, October 19, 2009, and the State began presenting its case the next day. On the afternoon of Thursday, October 22, the prosecutor informed the trial court that he had intended to call Woods as a witness at that point and had attempted to serve him with a subpoena at his last known address in Marion County but had had no contact with him since approximately August 2009. The prosecutor stated that he had contacted Woods's family, who had informed him that they would "make contact with [Woods] and let him know to contact" the prosecutor. Tr. at 484. The prosecutor offered to provide testimony from an investigator in the Lake County prosecutor's

office who had been in contact with a Marion County investigator "who ha[d] been tracking Mr. Woods and finally found his new residence[.]" *Id.* at 485. The prosecutor asked to use Woods's prior testimony at Taylor's first trial "in lieu of his live appearance under the rules of evidence for unavailability." *Id.*

Defense counsel objected, characterizing Woods as the State's "star witness" and complaining that the State had waited until the fourth day of trial to inform him "that [Woods] had a change of address and that they had no contact […] with him." *Id.* Defense counsel disputed the prosecutor's claim of unavailability and requested either a mistrial or the exclusion of Woods's prior testimony.

The trial court denied the motion for mistrial and allowed the prosecutor to call the Lake County investigator to the stand. The investigator testified that he had contacted his counterpart in Marion County in late September 2009 and had faxed him the subpoena with Woods's address. The Marion County investigator went to the address, but Woods was not there. Sometime after September 30, the Marion County investigator telephoned Woods, who said that he had moved to another street in Indianapolis but gave no address. A couple days later, the Marion County investigator visited Woods's supposed employer, "which turned out to be a dead-end." *Id.* at 496. The Marion County investigator attempted to contact one of Woods's relatives, which "turned out to be a dead end also." *Id.* at 502. The Marion County investigator learned from the Marion County probation department that Woods had an outstanding bench warrant "and another address, which he followed up and went to with - - to no avail. Nobody answered the door at that address." *Id.* at 496. The

Lake County investigator stated that he had tried to call Woods "a couple of times" and had "tried different phones so he wouldn't recognize the phone number" but had never been able to speak with Woods. *Id*. at 497. The Lake County investigator acknowledged that by October 14 or 15, he had exhausted "[a]ll the avenues that [he] had[.]" *Id*. at 505.

At the conclusion of the investigator's testimony, the trial court agreed with defense counsel that "there's something wrong with this picture" and that the court and defense counsel "should have been notified about this" but ultimately determined that the State had "done a reasonable job at trying to locate [Woods]" and that it was "going to allow [Woods's testimony from the first trial] to be read into the record." *Id*. at 509. Defense counsel requested a one-week continuance, which was denied, and then agreed to an adjournment. The next day, the trial court denied defense counsel's motion to reconsider its ruling and allowed Woods's testimony to be read into the record.

On appeal, Taylor contends that the trial court erred in admitting Woods's testimony. In addressing Taylor's contention, we use the following standard of review:

> A trial court has broad discretion in ruling on the admissibility of evidence, and absent an abuse of that discretion, we will not disturb the trial court's decision. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Further, a claim of error in the admission or exclusion of evidence will not prevail on appeal unless a substantial right of the party is affected. To determine whether a substantial right of a party has been affected, we assess the probable impact of the evidence upon the jury. When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction, the substantial rights of the party have not been affected, and we deem the error harmless.

Schmid v. State, 804 N.E.2d 174, 181 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*.

Taylor asserts that the trial court's admission of Woods's testimony violated his constitutional right of confrontation. The Sixth Amendment to the U.S. Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him[.]" The Sixth Amendment prohibits admission of testimonial statements by a person who is absent from a criminal trial, "unless the person is unavailable and the defendant has had a prior opportunity to cross-examine the person." *Tiller v. State*, 896 N.E.2d 537, 543 (Ind. Ct. App. 2008) (citing, inter alia, *Crawford v. Washington*, 541 U.S. 36 (2004)). Indiana Evidence Rule 804(a)(5) provides that a person is unavailable as a witness if he "is absent from the hearing and the proponent of a statement has been unable to procure [his] attendance by process or other reasonable means." A finding of unavailability can be implicit in the trial court's admission of the absent person's testimony, and the burden is on the appellant to prove that the decision "was clearly against logic and the natural inferences to be drawn from the record." *Freeman v. State*, 541 N.E.2d 533, 538 (Ind. 1989).

Specifically, Taylor contends that Woods was not unavailable for purposes of the Sixth Amendment and Evidence Rule 804. The Indiana Supreme Court has stated that a witness is unavailable "only if the prosecution has made a good faith effort to obtain the witness's presence at trial." *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002). "Even if there is only a remote possibility that an affirmative measure might produce the declarant at trial, the good faith obligation *may* demand effectuation. Reasonableness is the test that limits the extent of alternatives the State must exhaust." *Id*. at 724-25 (citation omitted).

Taylor's only quibble with the State's efforts to obtain Woods's presence at trial appears to be that the Marion County investigator did not "ask[] [Woods] for his phone number or notif[y] him that he was required to be in trial in Lake County on October 19, 2009." Appellant's Br. at 9. Even so, we conclude that the State made reasonable efforts to obtain Woods's presence at trial. The State attempted to locate Woods at two different addresses and contacted his family and supposed employer, all to no avail. Although the better practice might have been for the State to notify the trial court and defense counsel more promptly that it was having difficulty locating Woods, that does not alter our conclusion that Woods was unavailable for purposes of the Sixth Amendment and Evidence Rule 804 and that the trial court did not abuse its discretion in admitting Woods's testimony.[1]

II. Sufficiency of Evidence

To convict Taylor of attempted murder, the State was required to prove beyond a reasonable doubt that he, acting with the specific intent to kill, engaged in conduct that constituted a substantial step toward the commission of murder. *Amos v. State*, 896 N.E.2d 1163, 1171 (Ind. Ct. App. 2008) (citing Ind. Code §§ 35-42-1-1 (murder) and 35-41-5-1 (attempt)), *trans. denied* (2009). Taylor claims that "[w]hat is most disturbing about the facts of this case is the lack of a motive to kill or even shoot anyone" and that although he "acted with the intent to kill Boyd or the knowledge that his actions might kill Boyd, he had no

[1] In any event, we note that several eyewitnesses other than Woods testified that Taylor shot Gardner and his companions. *See* Tr. at 118 (Gardner); *id*. at 148 (Miller); *id*. at 202 (Carey). As such, any error in the admission of Woods's testimony could only be considered harmless.

specific intent to kill anyone else and they were injured by his reckless actions." Appellant's Br. at 10, 11.

Our standard of review is well settled:

> Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. We respect the jury's exclusive province to weigh conflicting evidence. We must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.

Smith v. State, 915 N.E.2d 1037, 1038 (Ind. Ct. App. 2009) (citations omitted). "Intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime as well as from the use of a deadly weapon in a manner likely to cause death or great bodily harm." *Amos*, 896 N.E.2d at 1171.

We agree with Taylor that his apparent lack of motive for shooting five people is disturbing, to say the least. That said, "motive is not an element of the crime of attempted murder." *Wilson v. State*, 611 N.E.2d 160, 165 (Ind. Ct. App. 1993), *trans. denied*. Taylor fired at least twelve .45-caliber jacketed hollow-point bullets into a crowded elevator at point-blank range. From this evidence, a reasonable trier of fact could find beyond a reasonable doubt that Taylor specifically intended to kill all his defenseless victims.[2] Therefore, we affirm his attempted murder convictions.

[2] When questioned about the effect of a jacketed hollow-point bullet inside a person's body, Detective Jay Cruz testified that when such a bullet "hits liquid of any sort, it fills that hollow cavity and it spreads out, much like a - - a mushroom." Tr. at 532.

III. Recklessness Instruction

At the close of evidence, Taylor tendered jury instructions on lesser included offenses, including criminal recklessness and reckless homicide, as well as an instruction defining "recklessly" as follows:

> A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. This requires the State to prove more than mere negligence on behalf of the accused.

Appellant's App. at 110. The trial court refused to give the final sentence of the instruction. On appeal, Taylor contends that the court erred in doing so.

We review a trial court's refusal to give a tendered instruction for an abuse of discretion. *Forte v. State*, 759 N.E.2d 206, 209 (Ind. 2001). "We consider (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given." *Id*. "[A] defendant is entitled to an instruction on any defense which has some foundation in the evidence, even when that evidence is weak or inconsistent." *Smith v. State*, 777 N.E.2d 32, 37 (Ind. Ct. App. 2002). An instruction is properly rejected if it would tend to mislead or confuse the jury. *Shane v. State*, 615 N.E.2d 425, 429 (Ind. 1993).

Specifically, Taylor argues that "the evidence supported the giving of the instruction as well as [his] theory of the case. Negligence was not adequately covered by any other instructions." Appellant's Br. at 13. We first note that the case Taylor cites in support of the

tendered instruction, *Springer v. State*, 779 N.E.2d 555 (Ind. Ct. App. 2002), which involved an identical instruction, was vacated in pertinent part by our supreme court. *See Springer v. State*, 798 N.E.2d 431 (Ind. 2004). We admonish counsel to check his citations more carefully in the future.

We further observe that Taylor did not raise the issue of negligence at trial and that, in any case, "no reasonable interpretation of the facts suggests that [his] conduct was merely negligent, that he merely failed to exercise reasonable or ordinary care." *Springer*, 798 N.E.2d at 435. Any negligence argument would have been "simply a statement that [the] State failed to prove that he was reckless. No additional instruction to the jury on this point was required." *Id.* "While the jury had the responsibility of determining whether [Taylor's] conduct was reckless, there was no legal question of negligence at stake." *Id.* at 436. Moreover, we agree with the State that the tendered instruction likely would have confused the jury and that the trial court did not abuse its discretion in striking the final sentence of the instruction.

IV. Appropriateness of Sentence

The trial court sentenced Taylor as follows:

> The Court finds in mitigation that you have no prior criminal history and that today you did express remorse and apologized to the victims for your actions. In aggravation, the Court finds the nature and circumstances of this crime, the fact that you followed these young people to the elevator, giving you an opportunity during that walk to contemplate what you were about to do and you could have either stopped, done something else at that point, that you waited until they were in the elevator when they had no cover, they couldn't escape from your attack, the Court finds that to be just a very heinous act, to trap them in the elevator like that and shoot at them.

> As far as [defense counsel's] comment that the one mitigator he found was that […] long-term incarceration would be a detriment to your family, apparently you're not living with any of [your five] children, taking care of them on a day-to-day basis. They live other places with their mothers. Some have support orders entered, and some don't have support orders entered. So you're not a constant factor in raising these children. Therefore, that - - the Court doesn't find that to be a compelling mitigator, because you're not there all the time to help with the - - raising these children anyway.
>
> The Court is going to sentence you today on Count I, murder, to 55 years in the Department of Corrections; on Count II, III, IV, and V, attempted murder, to 30 years in the Department of Corrections; and the Court is going to run those sentence[s] consecutively. The Court finds that each life that was touched deserves an independent sentence, and they will be run consecutively for that reason.

Sentencing Tr. at 42-43.

Taylor asks us to reduce his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Taylor bears the burden of persuading us that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. "[R]egarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Id*. Taylor received the advisory sentence for each conviction. *See* Ind. Code § 35-50-2-3 ("A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years."); Ind. Code § 35-50-2-4 ("A person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years."). Taylor glosses over the heinousness of the

offenses, stating only that they "left one person dead and four others seriously injured." Appellant's Br. at 13. But for his lack of criminal history and expression of remorse, Taylor's senseless shooting of defenseless partygoers in an elevator would have justified a sentence far above the advisory on each count. Taylor contends that the trial court should not have imposed consecutive sentences, but we strongly disagree, given our supreme court's acknowledgement that "[c]onsecutive sentences reflect the significance of multiple victims." *Pittman v. State*, 885 N.E.2d 1246, 1259 (Ind. 2008).[3] In sum, Taylor has failed to persuade us that his sentence is inappropriate. Therefore, we affirm the trial court in all respects.

Affirmed.

FRIEDLANDER, J, and BARNES, J., concur.

[3] Taylor argues that consecutive sentences are inappropriate to the extent that they are based on the trial court's observation that he had a "chance to stop" before he cornered his victims in the elevator and shot them. Appellant's Br. at 14. Taylor "does not believe that this is an appropriate aggravating circumstance in that in any crime of murder, the offender had the opportunity to stop his actions." *Id*. Be that as it may, Taylor's firing of at least a dozen high-caliber hollow-point bullets into a crowd of helpless people in an elevator is an unusually senseless and brutal act and thus deserving of a lengthy sentence.