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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1003-CR-308
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0906-FB-53695

October 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Timothy Williams appeals his convictions for attempted robbery, as a Class B felony; battery, as a Class C felony; and carrying a handgun without a license, as a Class A misdemeanor. Williams presents two issues for review:

1. Whether the evidence is sufficient to support his conviction for attempted robbery.[1]

2. Whether the admission of a witness' deposition testimony at trial violated Williams' right to confrontation.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 19, 2009, Lorenzo Ford and Chad Hammes were at Ford's house in Indianapolis when Hammes spoke with his cousin, Williams, by phone and arranged for Ford to sell marijuana to Williams. When Hammes concluded the call, he and Ford drove in Ford's car to the intersection of 38th Street and Boulevard Place. While in the car, Hammes made another telephone call to obtain directions from Williams, and then Ford and Hammes headed to another location in the same general area. When Hammes and Ford found Williams near 42nd Street and Boulevard, Williams entered Ford's car, and the three men drove to yet another location.

When the car reached its destination, the three men exited the car. Ford then sat down on the passenger side with his feet out of the car while Hammes and Williams stood nearby. At Williams' request, Ford gave him a sample of the marijuana to smell. Ford then looked down at his phone momentarily. When he looked up again, Williams

[1] Williams does not argue that the evidence is insufficient to support his convictions for battery or carrying a handgun without a license.

was pointing a gun at him. Williams told Ford "to give him what [Ford] got [sic]." Transcript at 89. In response, Ford gave Williams the marijuana. Williams "just stood there for at least two seconds." Id. at 90. Ford thought that Williams was going to take his car and his wallet. Ford tried to "get to the driver's seat and pull off [sic]" when Williams shot him in the hip and then "took off down the street" on foot. Id. at 90-91.

Ford walked around the car and then entered the driver's side. Hammes re-entered the car as well, and Ford attempted to drive home. After driving a couple of blocks, Ford pulled into a gas station on 38th Street and called the police. Ford told the dispatcher that he had been shot. After emergency personnel arrived, Ford was transported to the hospital. He was discharged five or six days later.

Following his discharge, Ford spoke with Detective Delbert Shelton of the Indianapolis Metropolitan Police Department. Ford explained to the detective how he had come to be shot, although he did not disclose that he had been selling marijuana at the time. Ford later gave a second statement to the detective, in which he admitted that he had been selling marijuana at the time of the shooting. From a photo array, Ford identified Williams as the shooter. Williams deposed Hammes on September 10, 2009.

The State charged Williams with attempted robbery, as a Class B felony; battery, as a Class C felony; and carrying a handgun without a license, as a Class A misdemeanor. A jury trial was held on February 4, 2010. Before the trial began, the court heard the State's motion to introduce Hammes' deposition into evidence because they could not locate Hammes. The court granted the motion over Williams' objection. At the conclusion of the evidence, the jury returned a verdict of guilty as charged on all counts.

On February 17, the court sentenced Williams to ten years for attempted robbery, with four years suspended; four years for battery, executed; and one year for the handgun charge, executed, with the sentences to be served concurrently. Williams now appeals.

DISCUSSION AND DECISION

Issue One: Sufficiency of Evidence

Williams first contends that the evidence is not sufficient to support his conviction for attempted robbery. Specifically, he argues that the evidence does not show beyond a reasonable doubt that Williams attempted to rob Ford of his vehicle and money, as alleged in the charging information. We cannot agree.

When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind.2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Williams' argument that "no facts actually support the conviction" for attempted robbery is not supported by the record. Ford testified that Williams pointed a gun at him, demanded that Ford "give him what [Ford] got [sic]," Transcript at 89. Ford gave Williams all of the marijuana, but he understood Williams to be demanding Ford's car and money, too. After taking the marijuana, Williams waited a couple of second, and then Ford attempted to get into the driver's seat in order to drive way. Only after Ford

attempted to drive away did Williams shoot him. Ford's testimony supports the conviction for attempted robbery.

Still, Williams contends that Hammes' deposition testimony contradicts Ford's testimony. In particular, Williams points to Hammes' testimony that he interpreted Williams' statement to demand "all the weed and stuff." Transcript at 161. Williams' argument in that regard is merely a request that we reweigh the evidence, which we will not do. See Jones, 783 N.E.2d at 1139.

Williams also argues that Ford's interpretation of Williams' demand is not evidence of Williams' intent. We cannot agree. "Because intent is a mental state, the fact-finder often must 'resort to the reasonable inferences based upon an examination of the surrounding circumstances to determine' whether—from the person's conduct and the natural consequences therefrom—there is a showing or inference of the requisite criminal intent." Diallo v. State, 928 N.E.2d 250, 253 (Ind. Ct. App. 2010) (citation omitted). Here, it was for the jury to determine whether Ford reasonably inferred that Williams was demanding Ford's car and money. See id. We will not reweigh that evidence. See Jones, 783 N.E.2d at 1139. Williams has not shown that the evidence is insufficient to support his conviction for attempted robbery.[2]

Issue Two: Admission of Evidence

Williams next contends that the trial court abused its discretion when it admitted Hammes' deposition testimony into evidence at trial. Specifically, Williams argues that

[2] The State alleges that the reference to Ford's car and money in the charging information constitutes an immaterial variance. Because we conclude that the evidence is sufficient to support Williams' conviction based on Ford's testimony, we need not consider the variance argument.

the admission of Hammes' deposition testimony violated Williams' right of confrontation under the Sixth Amendment to the United States Constitution. We cannot agree.

Our supreme court has discussed the admission of deposition testimony as follows:

> Generally, deposition testimony of an absent witness offered in court to prove the truth of the matter asserted constitutes classic hearsay. Possible exceptions to the hearsay rule lie under both Indiana Trial Rule 32 and Indiana Evidence Rule 804, which allow the use of prior recorded testimony in lieu of live testimony in certain circumstances. The decision to invoke the rule allowing admission of prior recorded testimony such as a deposition, is within the sound discretion of the trial court.

Garner v. State, 777 N.E.2d 721, 723-24 (Ind. 2002). But the use of deposition testimony at trial is limited:

> The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

Pendergrass v. State, 913 N.E.2d 703, 705 (Ind. 2009), cert. denied, 130 S. Ct. 3409, 177 L. Ed. 2d 323 (U.S. 2010).

Here, Williams argues that the State has not shown that Hammes was unavailable as contemplated in the Confrontation Clause analysis when he did not appear at trial. As our supreme court has stated:

> A witness is unavailable for purposes of the Confrontation Clause requirement only if the prosecution has made a good faith effort to obtain the witness's presence at trial. Even though Trial Rule 32(A) permits use of an absent witness's deposition testimony if the court finds that the "witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition," we have

> previously determined that this trial rule is not applicable to claims involving a violation of the defendant's Sixth Amendment right of confrontation. The issue is not whether the witnesses were out-of-state at the time of trial, but whether the State made a good faith effort to obtain the absent witnesses' attendance at trial.[] 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.

Garner, 777 N.E.2d at 724-25 (citations omitted). In Garner, the State "took steps necessary to preserve the testimony" of two witnesses that it knew would be out of town on vacation on the trial date. The defendant had asked that a different matter be tried before the start of trial, which might have allowed time for the witnesses to return to town, but the State did not agree to that arrangement. On appeal the court held that, on the facts presented, the "postponement of the proceedings would have constituted a good faith effort to procure attendance." Id. at 725.

This court has also addressed unavailability to testify. In Tiller v. State, 896 N.E.2d 537 (Ind. Ct. App. 2008), the defendant was charged with attempted murder, as a Class A felony; confinement, as a Class B felony; aggravated battery, as a Class B felony; and battery, as a Class C felony. Four to five weeks before trial, the victim informed the prosecutor that he did not want to testify. The State served a subpoena on him two weeks before trial, and the prosecutor verified that the victim knew the trial date. Shortly before trial, the victim cooperated by allowing the State to take a DNA sample, and he gave no further indication of his reluctance to testify. But the Friday before trial, the prosecutor learned that the victim had gone to Wisconsin. The following day he told the prosecutor by phone that he was afraid to testify. On Sunday the prosecutor obtained a writ of body attachment, but the victim did not appear for trial. On those facts, this

court held that the "State's efforts in securing Cannon's appearance at trial were reasonable." Id. at 544.

Here, Williams had a prior opportunity to cross-examine Hammes. Indeed Williams was the party who took Hammes' deposition. Thus, we consider only whether Hammes was unavailable for purposes of the Confrontation Clause requirement.

The prosecutor spoke with Hammes on January 25, three days before Williams' original trial date, and confirmed Hammes' address. The prosecutor scheduled an appointment with Hammes, but Hammes did not attend. Williams' trial was later continued to February 17. On February 15, the lead detective in Williams' case went to Hammes' home and spoke with his mother. Because Hammes was not home, the detective left with the mother a subpoena for Hammes' appearance at trial. Hammes' mother indicated that she would contact him about the subpoena. However, Hammes did not appear for trial.

On these facts, we conclude that the State undertook reasonable efforts to secure Hammes' appearance at trial. The circumstances in this case are unlike the facts in Garner, where the State made no effort to secure the witnesses' attendance at trial, and are more like the facts in Tiller, where the State took some steps to assure the witness' attendance. Nevertheless, Williams argues that "no one drove around the area looking for Hammes[,]" nor did they look for Hammes at the homes of his relatives, request a continuance, petition to have Hammes found in contempt of court, or request a body attachment. But, again, the test is the reasonableness of the State's conduct in attempting to secure the witness' attendance at trial. Garner, 777 N.E.2d at 725. Reasonableness

does not demand that the State make every possible effort to secure a witness' attendance. See id. Williams' argument regarding the witness' unavailability is without merit.[3]

Because we conclude that the State made reasonable efforts to secure Hammes' attendance at Williams' trial, we conclude further that the trial court did not abuse its discretion when it determined that Hammes was unavailable for trial, as contemplated in the Confrontation Clause context. As such, the court also did not abuse its discretion when it admitted his deposition testimony in evidence. Therefore, Williams has not demonstrated that the admission of Hammes' deposition testimony violated the Confrontation Clause.[4]

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.

[3] In its brief, the State observes that Williams "does not address Trial Rule 32[,]" which governs the use of depositions in court proceedings. But that trial rule "is not applicable to claims involving a violation of the defendant's Sixth Amendment right of confrontation." Garner, 777 N.E.2d at 724. Thus, Williams did not address that trial rule, and we do not consider it here.

[4] Because we conclude that the trial court did not abuse its discretion by admitting Hammes' deposition into evidence, we need not address the State's alternative argument that the admission of that deposition into evidence was harmless error.