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IN THE
COURT OF APPEALS OF INDIANA

LONNIE WASHINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0605-CR-238
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0508-MR-140718

December 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Lonnie Washington appeals his convictions for felony murder, Class A felony robbery, and Class B felony criminal confinement. We affirm in part, reverse in part, and remand.

Issues

Washington raises three issues, which we reorder and restate as:

I. whether there is sufficient evidence to support the felony murder conviction;

II. whether the trial court properly denied his motion for mistrial; and

III. whether his convictions for felony murder and robbery violate double jeopardy.

Facts

In the late morning of July 4, 2005, Lewis Beverly and his friend, Jennifer Miller, were at Beverly's house when Edward Mobley stopped by looking for Beverly's roommate. Beverly's roommate was away, and Mobley talked to Miller and Beverly for about a half an hour. During that time, Mobley observed Beverly count $200 to $300. Mobley also agreed to come back around 4:00 that afternoon expecting that Beverly's roommate would be home then. After Mobley left, Miller and Beverly walked down the street to another house, where Miller visited with Demetrius Jenkins. Washington, Matthew Pittman, and Mohammed Steele were also at that house. While they were all there, Miller arranged for someone else to take her to pick up food. Beverly gave Miller

$15 to get the food. At that time, Miller observed that he had less than $500 in his pocket. Miller left, and Beverly walked back to his house.

Shortly thereafter, Pittman asked Jenkins to get some tape from the house. Jenkins went inside and returned with gray tape, which he gave to Pittman. Washington, Pittman, and Steele left in the same direction as Beverly.

In the meantime, Mobley returned to Beverly's house around 3:00. He talked to Beverly for approximately a half an hour and then walked out to his truck to get a pen. As he returned to Beverly's house he noticed three men, one of whom was Washington, standing at the side entrance of Beverly's house. Mobley went in using the front door, and the three men came in the side door. Beverly sat on a couch, Mobley sat on a speaker box, Washington sat in a chair, and the other two men stood behind Beverly in the kitchen. Suddenly, one of the men standing behind Beverly jumped and kicked Beverly in the face, and the same man pulled out a black semiautomatic handgun. Beverly fell to the floor. Washington remained seated in the chair. Mobley ran out of the house, and the second man ran after him. Mobley got in his truck and left to call 911.

When Miller returned to the house down the street from Beverly's with the food, Jenkins told her not to go to Beverly's house. She remained on the porch with Jenkins and saw Mobley run to his truck and leave. At that point, Miller called Beverly's house and heard Beverly "hollering." Tr. p. 158. Miller also heard Beverly say, "I swear to God that's all I got" before she was disconnected. Id. at 161. Miller tried to call again but could not get through. Jenkins suggested that Miller call the police. Miller decided to go to Beverly's house. When she arrived, Beverly told her to come in. He was lying

on the floor and was "bloody from head to toe, his eye was hanging out, his lips [were] swollen and he had duct tape on his arms and legs . . . ." Id. at 164. Beverly told Miller he was dying. Miller called Beverly's mother and 911. Five days later, Beverly died of a gunshot wound to the head that he sustained during the incident.

On August 16, 2005, the State charged Washington with murder, Class A felony robbery, and Class B felony criminal confinement. The information was later amended to include a charge of felony murder based on the alleged robbery. A jury acquitted Washington of the murder charge but found him guilty of the robbery, confinement, and felony murder charges. The trial court sentenced Washington to sixty years on the felony murder conviction and three years on the criminal confinement conviction and ordered them to be served concurrently. The trial court did not sentence Washington on the robbery conviction because of double jeopardy concerns. Washington now appeals.

Analysis

I. Sufficiency of the Evidence

Washington argues that there is insufficient evidence to support the felony murder and robbery convictions because there is insufficient evidence to establish the robbery. When faced with a challenge to the sufficiency of evidence to support a conviction, we neither reweigh the evidence nor judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. If the probative evidence and reasonable

inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm. Id.

A person who kills another human being while committing or attempting robbery commits murder. Ind. Code § 35-42-1-1. A person who knowingly or intentionally takes property from another person or from the presence of another person resulting in serious bodily injury to any person other than a defendant commits Class A felony robbery. I.C. § 35-42-5-1. Finally, a person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. I.C. § 35-41-2-4.

Washington argues that there is insufficient evidence that Beverly had been robbed. He contends that although Miller saw Beverly with money before she went to get food, Beverly was known to have dealt drugs and that in drug dealing transactions money can move very quickly. This amounts to nothing more than a request to reweigh the evidence, a request we must decline. Mobley testified that earlier that morning he saw Beverly counting $200 to $300. Miller also testified that shortly before the incident, she observed Beverly with less than $500 in his pocket. Detective Tudor testified that no money was found in Beverly's pockets or in the house. Additionally, Miller testified that when she called Beverly's house after returning with the food she heard him say, "I swear to God that's all I got . . . ." Tr. p 161. From this the jury could have reasonably inferred that Pittman, Steele, and Washington robbed Beverly.

Washington also argues that he was not an accomplice but "someone who was at the wrong place at the wrong time with the wrong people." Appellant's Br. pp. 13-14. In determining whether a person aided another in the commission of a crime, we consider:

"(1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime." Garland v. State, 788 N.E.2d 425, 431 (Ind. 2003). Although Washington's presence during the commission of the crime or the failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, they may be considered along with other facts and circumstances tending to show his participation. See Hodge v. State, 688 N.E.2d 1246, 1248 (Ind. 1997).

Washington points out that Mobley did not see Washington react or join in the assault on Beverly and that it was Pittman who asked Jenkins for the duct tape. Although that may be true, Jenkins testified that Washington, Pittman, and Steele left shortly after Beverly in the same direction as Beverly. Mobley testified that while he was at Beverly's house, three men, including Washington, arrived there. Mobley also testified that Washington remained seated while either Pittman or Steele initially kicked Beverly in the face and drew a weapon and while the other man chased after Mobley, who fled the house. More importantly, only Washington's fingerprints were found on the duct tape retrieved from the scene of the crime. Taking Washington's presence at the scene of the crime, his earlier companionship with Pittman and Steele, his failure to oppose the crime while Mobley was present, and his fingerprints on the duct tape found at the scene, it was reasonable for the jury to infer that Washington was an accomplice to the robbery. There is sufficient evidence to support the felony murder conviction.

II. Motion for Mistrial

Prior to trial, Washington filed a motion in limine concerning the introduction of evidence relating to a handgun belonging to Washington. During the trial, Thomas Tudor, a homicide detective for the Indianapolis Police Department, testified on behalf of the State. At the conclusion of Detective Tudor's testimony, the trial court accepted questions from the jury. One of the jurors asked, "Was a gun ever recovered? If so was it determined who it belonged to or [sic] fingerprints on it?" App. p. 94. The trial court allowed the prosecutor and defense counsel to review the jurors' questions and neither had any objections to the questions. The trial court then questioned Detective Tudor as follows:

> Q: Was a gun ever recovered which could be compared favorably to the bullet and bullet fragment taken from Mr. Beverly?
>
> A: No, I would have to say no.
>
> Q: Were any suspect guns found?
>
> A. There was a weapon recovered with [Washington]. It's my understanding that the round is a small caliber round.
>
> [Defense Counsel]: Objection.
>
> Q: The gun that was associated with Mr. Washington couldn't have fired the shot?
>
> A: It's my understanding.

Tr. p. 334. Defense counsel then moved for a mistrial. The trial court denied the motion on the basis that there had been no objection to the jurors' questions.[1]

On appeal, Washington contends that the denial of his motion for mistrial placed him in grave peril because it "served to vilify [Washington] in the eyes of the jury by presenting him as armed and dangerous." Appellant's Br. p. 10. "As a freestanding ground for mistrial, the trial court's rulings as to misconduct are reviewed for abuse of discretion." Ritchie v. State, 809 N.E.2d 258, 269 (Ind. 2004), cert. denied, -- U.S. --, 126 S. Ct. 42 (2005). To grant a mistrial, the trial court must determine that no lesser step could have rectified the situation. Id. The trial court has discretion in determining whether to grant a mistrial. Id. at 269-70. The trial court's decision is afforded great deference on appeal because it is in the best position to gauge the surrounding circumstances of the event and the impact on the jury. Id. at 270.

Here, defense counsel objected and then moved for a mistrial. As our supreme court has observed, "[n]ot only must a defendant object to alleged misconduct, he or she must also request an appropriate remedy. Generally, the correct procedure is to request an admonishment." Etienne v. State, 716 N.E.2d 457, 461 (Ind. 1999). If counsel is not

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[1] In his reply brief Washington argues he did not object to the initial question because he was "relying on the motion in limine." Appellant's Reply Br. p. 2. "Our supreme court has determined that an objection to improper testimony is required at the critical point in the trial when the evidence is offered so the trial court may correct the alleged error." Pinkston v. State, 821 N.E.2d 830, 839 (Ind. Ct. App. 2004), trans. denied. "The requirement for a timely objection applies notwithstanding a trial court's pre-trial ruling—such as a motion in limine—on the admissibility of such evidence." Id. Nevertheless, because the trial court's questioning of Detective Tudor went beyond the scope of the question proffered by the jury, we will address the merits of the claimed error.

satisfied with the admonishment or it is obvious that the admonishment will not be sufficient to cure the error, counsel may then move for a mistrial. Id.

In his reply brief, Washington contends that admonishment was not requested because it would have magnified the harm. We rejected a similar argument in Gamble v. State, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005), trans. denied. In that case we observed:

> "A timely and accurate admonition is presumed to cure any error in the admission of evidence." Banks v. State, 761 N.E.2d 403, 405 (Ind. 2002) (quotation omitted). Had defense counsel requested an admonishment, the trial court would have had the opportunity to admonish the jury and presumably cure any error. See id. By not requesting an admonishment when he had the opportunity, Gamble essentially invited the error. "A party may not invite error, then later argue that the error supports reversal, because error invited by the complaining party is not reversible error." Kingery v. State, 659 N.E.2d 490, 494 (Ind. 1995). Because invited errors are not subject to appellate review, this issue is waived. See id.

Gamble, 831 N.E.2d at 184. Because a timely admonition presumably could have cured any alleged error in the admission of Detective Tudor's testimony and defense counsel essentially invited the error, this issue is waived. See id.

Waiver notwithstanding, Washington has not established that the trial court abused its discretion in denying the request for a mistrial. Under these circumstances, we believe the impact on the jury was minimal. After defense counsel objected, Detective Tudor explained that the weapon associated with Washington was not the murder weapon. Thus, the impact of the testimony on the jury was greatly reduced. Further, according to Mobley's testimony, Washington remained seated while one of his acquaintances kicked Beverly in the face and drew a weapon and Washington's fingerprints were the only

fingerprints found on the duct tape with which he was bound. Finally, as Miller testified, when she found Beverly he was "bloody from head to toe, his eye was hanging out, his lips [were] swollen and he had duct tape on his arms and legs . . . ." Id. at 164. Based on this evidence, we cannot conclude that Detective Tudor's testimony indicating that Washington was associated with a gun that was not the murder weapon inaccurately portrayed him as armed and dangerous or that it had such a significant impact on the jury so as to place him in a position of grave peril. The trial court did not abuse its discretion in denying Washington's motion for mistrial.

III. Double Jeopardy

Washington argues that the trial court improperly merged the robbery conviction into the felony murder conviction for sentencing purposes. He requests that we remand with instructions to vacate the conviction for robbery. The State concedes that "[d]ouble jeopardy principles are violated when a defendant is convicted of both robbery and felony murder when the robbery is the underlying basis for the felony murder conviction." Appellee's Br. p. 13 (citing Sanchez v. State, 794 N.E.2d 488, 491 (Ind. Ct App. 2003), trans. denied). The State also agrees that merging the two convictions for sentencing purposes cannot cure a double jeopardy violation and requests that we vacate Washington's robbery conviction.

At the sentencing hearing the prosecutor and the trial court discussed the proper remedy, and the trial court concluded:

> Show that the Court doesn't feel it can impose sentence [sic] on Counts Two and Counts Four, the acts complained of in Count Two are part of the acts complained of in Count Four. .

> . . I'm not going to vacate anything because I'm not sure it's my place to do it.

Tr. p. 411. The chronological case summary confirms that judgments of convictions were entered on both the robbery and felony murder charges. Because convictions were entered on both charges, we reverse and remand with instructions for the trial court to vacate Washington's robbery conviction. See Green v. State, No. 15S01-0611-CR-468 (Ind. Nov. 15, 2006) ("[A] defendant's constitutional rights are violated when a court enters judgment twice for the same offense, but not when a defendant is simply found guilty of a particular count.").

Conclusion

There is sufficient evidence to support Washington's felony murder conviction. The trial court did not abuse its discretion in denying Washington's motion for a mistrial. Because the convictions for both felony murder and robbery violate double jeopardy, we remand with instructions for the trial court to vacate the robbery conviction. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

SULLIVAN, J., and ROBB, J., concur.