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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA D. HUGHES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0512-CR-603
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert J. Schmoll, Judge
Cause No. 02D04-0501-MR-3

October 23, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Joshua Hughes ("Hughes") was convicted by a jury in Allen Superior Court of murder. He appeals his conviction, raising three issues, which we reorder and restate as:

I. Whether the trial court erred when it admitted a bag of cocaine into evidence;

II. Whether the trial court erred with its response to a jury question; and,

III. Whether sufficient evidence supports Hughes's conviction of murder.

Concluding that the trial court did not err and that sufficient evidence supports Hughes's conviction, we affirm.

Facts and Procedural History

In January 2005, Hughes worked as a maintenance technician at the Coliseum Park Apartments in Fort Wayne. Hughes was engaged to Lindsay Wolfe ("Lindsay"), with whom he had a daughter. On the morning of January 15, 2005, Lindsay visited both her mother Jacqueline Wolfe ("Jacqueline") and Hughes's mother before returning to the apartment she shared with Hughes. Lindsay slept until roughly 11:30 a.m. and then returned to her mother's house, while Hughes went to his mother's house. At around 1:00 p.m., Lindsay went upstairs to sleep while her parents watched her daughter.

Shortly after 3:00 p.m, Jose Valencia ("Valencia") was watching television in his apartment at the Coliseum Park Apartment complex when he heard a series of gunshots and a body fell through the ceiling of his apartment. Valencia heard someone running down the stairs, but did not see them. When Fort Wayne Police officers arrived a short time later, they found the body of Robert Dyke ("Dyke") lying on the floor of Valencia's apartment surrounded by pieces of drywall and sawdust. The unoccupied apartment

directly above Valencia's was used by maintenance technicians for parts for other apartments and apparently had no flooring.

That evening, Jacqueline woke Lindsay when Hughes called her cell phone. Hughes asked Lindsay if she had seen the news. When she asked what he meant, Hughes replied, "just watch the news." Tr. p. 183. After ending the call, Lindsay told her mother that Hughes had told her "it had been taken care of" or "its over." Tr. p. 248. Lindsay left her daughter with her parents and returned to the apartment she shared with Hughes between 9:00 and 9:30 p.m.

Later, when the television news came on, Lindsay learned that there had been a shooting at the apartment complex where Hughes worked. She asked Hughes what was going on and he told her, "we don't have to be afraid any more." Tr. p. 187. Lindsay's mother also saw a news report of the shooting and called Lindsay. Lindsay and Hughes drove separately to Jacqueline's house. The three sat in the living room and Hughes told them that he had shot "Rob" and that "he got him a bag and Rob a bag and that Rob did him for $1,000.00." Tr. pp. 191-92; 250-51.

On January 21, 2005, the State charged Hughes with the murder of Robert Dyke. A jury trial commenced on August 23, 2005. At trial, the State introduced into evidence a bag of cocaine that police found outside the apartment adjacent to Valencia's. The trial court admitted the evidence over Hughes's objection. After the jury retired to deliberate, they sent a note with questions out to the trial court. Over Hughes's objection, the trial court directed the jury to two sections of the final instructions and reminded the jury to consider and view the instructions as a whole. Appellant's App. p. 434.

The jury convicted Hughes of murder and found that he had used a firearm in the commission of the murder. The trial court conducted a sentencing hearing on September 19, 2005, and sentenced Hughes to fifty-five years. Hughes now appeals.

I. Admission of Evidence

Hughes argues that the trial court abused its discretion when it admitted into evidence a bag of cocaine found on the front porch of the apartment next to the apartment where Dyke's body was found. Specifically, he contends that the probative value of the cocaine is outweighed by unfair prejudice due to the lack of evidence connecting Hughes to the cocaine. The balancing test of Indiana Evidence Rule 403 requires the opponent of evidence to show that the risk of unfair prejudice substantially outweighs the probative value of the evidence. Indiana Evidence Rule 403 (2006). "The evaluation of whether the probative value of a particular item of evidence is substantially outweighed by the danger of unfair prejudice is a discretionary task best performed by the trial court." Bostick v. State, 773 N.E.2d 266, 271 (Ind. 2002).

As noted above, the cocaine was found just outside the apartment next to the one where the victim's body was found. Chemical testing showed that the bag contained 53.76 grams of cocaine, which trial testimony indicated would carry a street value of $1000 to $2800. Tr. p. 370. Jacqueline testified that Hughes stated the incident arose over drugs, specifically that "he got him a bag and Rob a bag and that Rob did him for $1000." Tr. p. 251. In addition, Lindsay testified that Hughes had told her that he had loaned Rob $1000. Tr. pp. 193, 199. The cocaine found near the murder scene tended to make the State's theory that the murder was drug-related more probable. Therefore, we

cannot conclude that the probative value of the cocaine is substantially outweighed by any potential prejudicial effect. The trial court did not abuse its discretion in the admission of evidence.

II. Response to Jury Question

Next, Hughes argues that the trial court committed reversible error by responding improperly to the jury questions. During trial and after it had retired to deliberate, the jury sent the trial court the following questions:

> Why are we allowed to consider Mrs. Wolfe's testimony of what Josh supposedly said if we were not allow to hear others say what Josh told them[?] We understand that the State validates Jackie's testimony partially on what Lindsey has said but we are concerned about what parts of Lindsey's words to trust. Define hear say?

Appellant's App. p. 418. The trial court consulted with the parties, and over Hughes's objection, directed the jury to two sections of the final instructions and reminded the jury to consider the instructions as a whole. Appellant's App. pp. 432-35; Tr. p. 585.

Hughes argues that the trial court's failure to direct the jury only to reread the instructions in their entirety constitutes reversible error. Indiana Code section 34-36-1-6 governs the procedure for responding to jury questions. It states that if after the jury retires for deliberations, there is a disagreement among the jurors as to any part of the testimony or the jury desires to be informed as to any point of law arising in the case, the trial court shall provide the information required in the presence of, or after notice to, the parties or their attorneys. Ind. Code § 34-36-1-6 (1999).

Prior to the adoption of Indiana's new jury rules, the generally accepted procedure in answering a question of the jury was to reread all of the instructions in order

to avoid emphasizing any particular point and not to qualify, modify, or explain its instructions in any way. See Massey v. State, 803 N.E.2d 1133, 1137 (Ind. Ct. App. 2004). However, the new jury rules provide trial courts with greater flexibility in responding to jury questions. Id. Specifically, our new Indiana Jury Rule 28 urges that trial judges facilitate and assist jurors in the deliberative process, in order to avoid mistrials.

> Under appropriate circumstances, and with advance consultation with the parties and an opportunity to voice objections, a trial court may, for example, directly seek further information or clarification from the jury regarding its concerns, may directly answer the jury's question (either with or without directing the jury to reread the other instructions), may allow counsel to briefly address the jury's question in short supplemental arguments to the jury, or may employ other approaches or a combination thereof.

Tincher v. Davidson, 762 N.E.2d 1221, 1224 (Ind. 2002).

Here, in response to the jury's question, the trial court directed it to the following paragraphs from its final instructions:

> In weighing the testimony to determine what or whom you believe, you should use your own knowledge, experience and common sense gained from day to day living. The number of witnesses that testify to a particular fact, or the quantity of evidence on a particular point need not control your definition of the truth. You should give the greatest weight to the evidence which convinces you most strongly of its truthfulness.
>
> During the progress of the trial, certain questions have been asked and certain exhibits offered which the court may have ruled are not admissible into evidence. You must not concern yourself with the reasons for the rulings since the production of evidence is strictly controlled by rules of law.

Appellant's App. p. 434. The trial court also reminded the jury to consider and view the instructions as a whole. Id. In light of these facts and circumstances, we cannot conclude that the trial court erred in its response to the jury's questions.

III. Sufficiency

Finally, Hughes argues that the State presented insufficient evidence to support his conviction. Our standard of review for sufficiency claims is well settled. We neither reweigh the evidence nor judge the credibility of the witnesses. Cox v. State, 774 N.E.2d 1025, 1029 (Ind. Ct. App. 2002). We only consider the evidence most favorable to the verdict and the reasonable inferences that can be drawn therefrom. Id. Where there is substantial evidence of probative value to support the verdict, it will not be disturbed. Armour v. State, 762 N.E.2d 208, 215 (Ind. Ct. App. 2002), trans. denied.

Hughes contends that insufficient evidence was presented to establish that he was the person who shot and killed Dyke. Specifically, he claims that Lindsay's and Jacqueline's testimony was implausible and incredibly dubious. The "incredible dubiosity" doctrine applies where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. Thompson v. State, 765 N.E.2d 1273, 1274 (Ind. 2002).

The incredible dubiosity doctrine does not apply when the contested evidence was not from a single witness and circumstantial evidence of guilt was present. Thompson, 765 N.E.2d at 1274. Here, both Jacqueline and Lindsay testified that Hughes admitted to them that he shot Dyke. Tr. pp. 191, 250-51. In addition, the State presented testimony that as a maintenance technician, Hughes would have had access to the apartment where Dyke was shot, that the two exchanged numerous cell phone calls the day prior to and the

day of the shooting, and that the two had been involved in prior drug deals. Tr. pp. 291, 432-34, 440-41, 454.

When we review a claim of insufficient evidence, we cannot reweigh the evidence or assess witness credibility but must look only to the evidence favorable to the judgment. Hughes's challenges to the credibility and weight of the incriminating witnesses' testimony was presented to the jury, and from the evidence presented, a reasonable jury could find him guilty. We conclude that the evidence was sufficient to support Hughes's conviction.

Conclusion

The trial court did not abuse its discretion when it admitted the bag of cocaine into evidence and did not err with its response to the jury's questions. Sufficient evidence supports Hughes's conviction.

Affirmed.

BAKER, J., and BARNES, J., concur.