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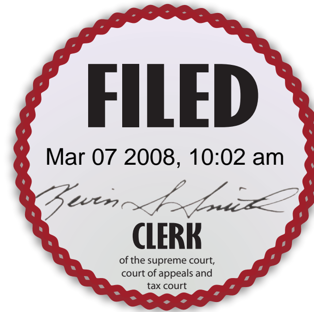

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IN THE COURT OF APPEALS OF INDIANA

HOWARD HARRIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A04-0708-CR-451

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0603-MR-43071

March 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Howard Harris ("Harris") appeals his convictions for two counts of Murder,[1] four counts of Attempted Murder, Class A felonies,[2] and one count of Burglary, as a Class B felony.[3] We affirm.

Issues

Harris presents three issues for review:

I. Whether the trial court abused its discretion by allowing testimony referencing omissions in the probable cause affidavit;

II. Whether the State presented insufficient evidence to support his convictions because the testimony of two primary witnesses was incredibly dubious; and

III. Whether his sentences are inappropriate.

Facts and Procedural History

During the evening of February 1, 2006, Royal Amos ("Amos") called Keyonia Dunn ("Dunn"), his ex-girlfriend, who was pregnant with his child, demanding that she surrender her SSI disability check to him. Amos threatened to kill Dunn if she did not comply.

Later that same evening, Harris drove Amos to Dunn's Indianapolis apartment. Inside the apartment, Dunn, her roommate Erika Thornton ("Thornton"), and their four children were sleeping. Harris broke through the door, and Amos entered the apartment armed with a handgun. Amos fired multiple gunshots into Dunn, Thornton, and their children. When he ran out of bullets, Amos began to bludgeon the children. Harris and Amos ran in different

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[1] Ind. Code § 35-42-1-1.
[2] Ind. Code §§ 35-42-1-1; 35-41-5-1.

directions, and Amos disposed of the gun by throwing it behind a residence. The pair met up later that evening and fled to Kentucky together.

At approximately 11:00 p.m. that evening, David Torres ("Torres") was walking his dog through the apartment complex when he heard children crying. As he approached the three children, Torres could see that they were covered in blood. The two older children were carrying their five-year-old brother, who had sustained multiple gunshot wounds. Torres and another apartment resident assisted the children and called 9-1-1. Police found Dunn and Thornton dead inside their apartment, and Dunn's two-year-old child gravely wounded. Each of the children survived.

Once they learned of Amos's threats against Dunn, the Indianapolis Metropolitan Police Department ("IMPD") issued an "attempt to locate homicide suspect" bulletin to other law enforcement jurisdictions and began to track activity on Amos's and Harris's cell phones. (Tr. 244.) As the investigation progressed, Amos and Harris were tracked to Bowling Green, Kentucky and later Bloomington, Indiana. Amos and Harris were arrested in Bloomington.

Harris and Amos were charged with Murder, Attempted Murder, Felony Murder, Battery, and Burglary. They were brought to trial separately. At the conclusion of his jury trial on June 21, 2007, Harris was convicted as charged. On July 11, 2007, the trial court vacated the convictions for Felony Murder and Battery and sentenced Harris on the remaining counts as follows. Harris was sentenced to fifty-five years for each of the two

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[3] Ind. Code § 35-43-2-1.

Murder convictions, thirty-five years for each of the four Attempted Murder convictions, and ten years for the Burglary conviction. All sentences were consecutive, providing for an aggregate sentence of two hundred and sixty years. This appeal ensued.

Discussion and Decision

I. Admission of Evidence

At trial, the State called as a witness Brian Wynne ("Wynne"), who had been incarcerated with Harris in the Marion County jail after the murders. Wynne testified that Harris had told him about the murders and disclosed various details, including motive, appearance of the apartment, gun caliber, clothing worn, and disposal of incriminating evidence. Wynne stated that, in addition to the conversation with Harris, he had "watched TV and read some accounts" and further "looked at his probable cause affidavit, which is basically just the outline of what they need to arrest you." (Tr. 504.) The State later attempted to elicit testimony from IMPD Detective Bill Rogers relative to the probable cause affidavit, and Harris objected that the document was not in evidence and was hearsay. The objections were overruled. Harris now contends that the trial court abused its discretion by admitting hearsay evidence that was prejudicial to him.

The decision to admit evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). Generally, the admission or exclusion of evidence will not result in a reversal on appeal absent a manifest abuse of discretion that results in a denial of a fair trial. Dorsey v. State, 802 N.E.2d 991, 993 (Ind. Ct. App. 2004). Hearsay is evidence of a statement made out-of-

court that is offered to prove the truth of a fact asserted in the statement. Ind. Evidence Rule 801(c); Craig v. State, 630 N.E.2d 207, 209 (Ind. 1994). The initial inquiry is whether the challenged testimony describes an out-of-court statement asserting a fact susceptible of being true or false. Dixon v. State, 869 N.E.2d 516, 519 (Ind. Ct. App. 2007).

Detective Rogers testified that he drafted the probable cause affidavit and did not include certain details to which Wynne later testified. Specifically, Detective Rogers testified that the probable cause affidavit did not mention that the door was "shouldered in." (Tr. 760.) It also did not include information that the apartment was bare of furniture, that the victims were on air mattresses, that a .380 caliber weapon was used, that a toy MP-5 gun was present, that the deceased were shot in the head, that a Crown Royal bag was used to dispose of bullets, that Amos wore a ski mask, or that Amos had made multiple calls to Dunn just prior to the murders. As such, Detective Rogers did not repeat a statement contained in the probable cause affidavit to prove the truth of a fact asserted therein. Rather, he testified concerning omissions from the affidavit. He did so in an attempt to dispel the possible impression from Wynne's testimony that Wynne may have gathered critical details from a review of the probable cause affidavit rather than from Harris's account. Harris has not demonstrated that the trial court abused its discretion by permitting Detective Rogers to refer to the probable cause affidavit.

II. Incredible Dubiosity

Harris seeks reversal of his convictions on grounds of insufficient evidence. More specifically, he asks that we disregard the State's evidence because "the sole evidence

implicating [him] in the crimes was from two incredibly dubious and unreliable jailhouse snitches." Appellant's Brief at 8.

In order to prove the charges against Harris, the State was required to establish that he, acting in concert with Amos, knowingly or intentionally killed Keyonia Dunn and Erika Thornton, attempted to commit the murders of J.T., K.T., R.T., and D.D. while having the specific intent to kill, and broke and entered the dwelling of Keyonia Dunn with the intent to commit the felony of murder. Ind. Code §§ 35-42-1-1, 35-41-5-1, 35-43-2-1; App. 64-69.

In addressing a claim of insufficient evidence, this Court must consider only the probative evidence and reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, and determine therefrom whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Whedon v. State, 765 N.E.2d 1276, 1277 (Ind. 2002).

In rare cases, appellate courts may apply the "incredible dubiosity" rule to impinge upon a jury's function to judge the credibility of a witness. Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007). Application of this rule is limited to cases in which a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence. Id. It is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Id. The standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. Id.

This case does not turn upon either a single incriminating witness or uncorroborated testimony. Wynne testified that Harris had claimed he and Amos had a plan to rob Dunn of her disability check and her boyfriend's drugs, and then described how the plan was carried out. According to Wynne's testimony, Harris pushed the apartment door open with his shoulder. He was the lookout while Amos went inside armed with a .380 weapon. After he heard "pops" and a woman cursing, Harris went down the hallway and saw the adult victims on air mattresses. (Tr. 478, 482-83.) The children were shot, one in the neck, and then pistol-whipped because "[Amos] ran out of bullets." (Tr. 490.) The pair "split up" but met up late that night. (Tr. 485.) They disposed of a ski mask by putting it in a snack bag and throwing it out on the way to Kentucky. Some .380 bullets in the vehicle were put in a Crown Royal bag and also placed in the chip bag for disposal.

Mark Estanislau ("Estanislau"), who was incarcerated with Harris in Monroe County, also testified that Harris described the events leading to the charges against him. According to Estanislau, Harris stated that Amos called an ex-girlfriend "and was threatening her for money or drugs because she was now dating a drug dealer maybe." (Tr. 544.) Harris revealed that he and Amos went to a two-bedroom apartment and Harris forced open the door. The apartment was bare of furniture but contained televisions, air mattresses, and a few toys. After Amos shot and bludgeoned the victims, Harris returned to his vehicle parked "down the side street" where the streetlight was out. (Tr. 538.) Harris and Amos later fled to Kentucky. En route, they disposed of bullets and a ski mask in a Crown Royal bag stuffed inside a snack bag.

Estanislau and Wynne testified consistently with regard to the motive, Harris's role in breaking down the door and acting as lookout, Amos's role as the shooter, the disposal of incriminating items, the sparse apartment furnishings, the type of injuries inflicted, and the flight to Kentucky. Victim K.T. testified that his assailant was wearing a ski mask. Police investigators testified that the murder weapon was a .380 caliber pistol, the apartment was bare of furniture, the door had been forced open, and the deceased were on air mattresses. Amos was linked to the crimes by DNA evidence. Dunn's sister, Lavonn Dunn, testified that she had spoken with Dunn in the evening hours just before her death, and Dunn had claimed Amos called and threatened to kill her if she did not surrender her SSI disability check.

Finally, Harris made certain self-incriminating statements when he was incarcerated in Monroe County. IMPD Sergeant Mark Gullion testified that Harris asked him, "Did you find the gun," and also stated, "Amos went into the apartment and started shooting and I ran." (Tr. 745-46.) Detective Bill Rogers testified that Harris twice asked if they had found the gun. Furthermore, Harris offered to take the officers to find the gun and bullets.

The State presented sufficient evidence that Harris, acting in concert with Amos, committed burglary, murdered Dunn and Thornton, and attempted to murder their four children.

III. Sentences

Finally, Harris asks that we consider whether his sentences are inappropriate. The trial court imposed consecutive sentences of fifty-five years for each murder, thirty-five years for each attempted murder, a Class A felony, and ten years for burglary, as a Class B felony,

for an aggregate term of two hundred and sixty years.

Indiana Code Section 35-50-2-3 provides that a person who commits murder shall be imprisoned for a fixed term of between forty-five and sixty-five years, with the advisory sentence being fifty-five years. Thus, Harris received the advisory sentence for each murder.

Indiana Code Section 35-50-2-4 provides that a person who commits a Class A felony shall be imprisoned for a fixed term of between twenty and fifty years, with the advisory sentence being thirty years. Thus, Harris received five years more than the advisory sentence for each attempted murder.

Indiana Code Section 35-50-2-5 provides that a person who commits a Class B felony shall be imprisoned for a fixed term of between six and twenty years, with the advisory sentence being ten years. Thus, Harris received the advisory sentence for his burglary conviction.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Nevertheless, our review under Appellate Rule 7(B) is deferential to the trial court, and "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The nature of the offenses is that Harris, in concert with Amos, broke into the apartment of Dunn, a pregnant and disabled woman, and executed a scheme to obtain her SSI

disability check, drugs, or both. Inside the apartment, a second woman, Thornton, and four children were sleeping. Both women were murdered with their children present. The children were subjected to multiple attacks, first by shooting and then by bludgeoning. When one child approached Harris for comfort or aid, he pushed the child away to avoid blood transfer evidence. Leaving the children seriously wounded and searching for helpful neighbors, Harris and Amos took steps to dispose of incriminating evidence and fled to another state.

The character of the offender is such that prior attempts at rehabilitation failed. By age twenty-three, he had committed seven prior felonies and four prior misdemeanors. He also had five adjudications as a juvenile delinquent. Since his incarceration in the instant matter, he accumulated sixty-six "write-ups at the jail." (Tr. 870.) Fourteen involved allegations of battery or the use of a weapon.

In light of the nature of the offenses and the character of the offender, we do not find that the advisory sentences for murder and burglary should be revised for inappropriateness, nor do we find that the sentences for attempted murder (each five years in excess of the advisory sentence) should be revised as inappropriate.

Affirmed.

NAJAM, J., and CRONE, J., concur.