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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM LONG,)

Appellant-Defendant,)

vs.)

No. 49A02-0707-CR-630)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0509-MR-166081

APRIL 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Following a jury trial, William Long was found guilty of Count I, Murder, Count III, Carrying a Handgun Without a License as a Class C felony, and Count IV, Unlawful Possession of a Firearm by a Serious Violent Felon as a Class B felony. The trial court entered judgments of conviction upon all three counts, but did not impose sentence upon the Class C felony.¹ The court sentenced Long to sixty years upon the murder conviction and a consecutive sentence of twenty years upon the Serious Violent Felon conviction.

The charges arose after Andre White died from three gunshot wounds inflicted in the course of an altercation involving several men, including Long, James Dearman, Marlan Wilson, and Kevin Thomas. After completion of the State's evidence at trial, the defense rested without submitting evidence. But during closing argument, it clearly appears that defense counsel was claiming that the State had failed to prove beyond a reasonable doubt that Long was the person who fired the lethal shots.

Upon appeal Long argues that the trial court erred in three respects:

- (1) Admitting hearsay evidence through the testimony of a police detective concerning information from an anonymous Crime Stopper tipster that Long was the shooter;
- (2) Admitting an audio of jail telephone conversations between Long and Kevin Thomas; and
- (3) Admitting written correspondence seized from Long's jail cell and admitting a handgun found in a shoebox located at the home of the mother of Long's girlfriend.

I. Anonymous Tipster Hearsay

¹ The purported "merger" of Count III into Count IV is inadequate. The judgment of conviction upon Count III is hereby ordered vacated. Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005).

At an early stage of the trial, Homicide Detective Lappin testified on cross-examination by the defense that during the course of his investigation he learned through an anonymous Crime Stopper's tip that Long was in Grant County. (Tr. p. 298).² Through Grant County authorities Lappin confirmed that Long was incarcerated there. Lappin went to Grant County where he obtained the phone call information involving Long and Kevin Thomas. Pursuant to that information, Lappin obtained a search warrant and seized the correspondence from Long's jail cell.

In subsequent testimony, Detective Lappin stated that some twenty-three days after the shooting he received a Crime Stopper's tip that "Mr. Will Long was the actual shooter in this homicide, and that he was currently incarcerated in the Grant County jail on an unrelated matter." (Tr. p. 401).

The State asserts that Long has waived any claim that Lappin's reference to the tip was inadmissible hearsay. We agree. When Lappin, for the second time, mentioned the tip and its substance, Long interposed what could be considered as some question as to admissibility.³ The Court then asked: "Are you objecting to the hearsay nature of that statement?" (Tr. p. 400). Defense counsel responded: "No, Judge. I'm objecting to a record that I made on the out-of court hearing. And a continuing objection. But I don't want to --- I want his testimony to flow but I also want to preserve the record." (Tr. p. 400) (Emphasis supplied).

² At this point in the trial no mention was made that the tipster had said that Long was "the shooter".

³ The first time the anonymous tip was mentioned was in response to a question by defense counsel as to how Detective Lappin learned that Long was in Grant County. The defense thus invited the answer received.

We have been unable to locate in the record before us any such objection made in an out-of-court hearing. We therefore conclude that Long has waived any hearsay objection to the contents of the Crime Stopper's tip to the effect that Long was "the shooter."⁴

Long seeks to avoid waiver by a claim of fundamental error. We note that before any mention of the tip was made, James Dearman, Marlan Wilson, Kevin Thomas, and Paula Ford had all testified.

James Dearman testified that there was a physical altercation involving Andre White, the victim, concerning some cell phones. Marlan Wilson and Kevin Thomas were part of the fight, and Dearman attempted to break it up. Long showed up with a gun and shot White. (Tr. p. 97). He shot him two more times. (Tr. p. 113). Dearman was grazed by a bullet. Subsequently, in a statement to police, Dearman identified Long as the shooter.

Marlan Wilson testified that he heard a gunshot, turned around, and saw Long within approximately eight or nine feet of Andre White. Long had a gun pointed at White. (Tr. pp. 131-133, 137). He heard another gunshot, turned around, and again saw Long and White across the street. Long still had the gun pointed at White.

Paula Ford was driving her car in the area, and pulled to the side of the street because she had dropped her cell phone on the floor of her car. She was not acquainted

⁴ Long's appellate argument interposes a claim that aside from any hearsay impediment to the tip from the anonymous source, the assertion that Long was the "shooter" was not relevant to how Detective Lappin learned that Long was in Grant County. The fact remains however, that the second mention of the tip was not in relationship to the first mention involving how Lappin found out that Long was in Grant County. The relevance argument, in context, therefore fails.

with any of the persons involved in the altercation. She testified that she heard multiple gun shots, and saw a man pointing at the shooting victim. She heard another person say: “Will, you did not have to do that.” (Tr. pp. 74, 84).

Long asserts that the tip tended to reinforce the testimony of the witnesses that Long fired the fatal shots, and that this reinforcement was reversibly prejudicial because the other evidence was weak. We reject the claim of fundamental error.

The testimony of those who were present at the scene provided relevant and credible evidence that Long was the person who fired the fatal shots. Additionally, the murder weapon was located at the home of the mother of Long’s girlfriend. The weapon was tied to Long.

As stated in Robertson v. State, 877 N.E.2d 507, 514 (Ind. Ct. App. 2007):

When there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction or where the offending evidence is merely cumulative of other properly admitted evidence, the substantial rights of the party have not been affected, and we deem the error harmless.

Such is the case before us, and accordingly, we deem the error, if any, harmless.

II. Jail Telephone Conversations

When Detective Lappin went to the Grant County Jail after learning that Long was incarcerated there, he obtained an audio recording of portions of two telephone calls made by Long to Kevin Thomas. Those conversations were redacted. The redactions were pursuant to defense requests so that discussion of unrelated events would be omitted.

On appeal, the defense does not question the redactions of the audio or the redactions made to a transcript of the audio. Rather, Long asserts that the audio recording should not have been played for the jury because of its poor quality. His argument appears to be that because of the quality of the recording of the conversations, the purported relevance would not be made sufficiently clear to the jury.⁵

Based upon our conclusion that the audio recording of the telephone conversations between Long and Thomas were of sufficient clarity for the jury's hearing and understanding, particularly with respect to Long's part of the conversations, we find no error in the admission of the audio recording.

III. Seizure of Correspondence and Handgun

As noted in footnote 5 of this opinion, Detective Lappin obtained a search warrant for Long's Grant County jail cell. The warrant targeted letters or written correspondence. The warrant was executed and the return reflected that eighteen "paper documents including letters, notes, addresses and a card" were seized. (Exhibits p. 66). Among the items, was a letter in an unmailed envelope addressed to:

Ms. Cindy Ferguson
1132 N. Apperson Way

⁵ Although responses by Thomas to Long's statements may not have been always clearly audible the statements of Long were of adequate clarity. Long told Thomas to "grab them tennis shoes". . . [that were] "in a box" . . . "and send it swimmin'." (Exhibits 9 and 10, Exhibits pp. 10-14). Long stated "That's-that's the direct link-my tennis shoes." *Id.* Detective Lappin stated that during the conversation, Long advised Thomas that the telephone conversations were recorded, and that Thomas should "put it in writing." (Tr. p. 337). Based upon this information, along with the investigation information provided by two eyewitnesses, Detective Lappin obtained a search warrant for Long's jail cell. Presumably, it was thought that Long's jail cell might contain correspondence in writing which would assist in the murder investigation.

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(Exhibits p. 39). In that letter Long had written: “Did you get rid of that one thing like I asked of you? If not I need you to do the (sic) A.S.A.P. please.” *Id.* During Long’s telephone conversation with Kevin Thomas, Long asked Thomas to dispose of “tennis shoes” in a shoebox. The conversation also indicated that the “tennis shoes” were in “Cindy[’s]” possession. Combining the telephone conversation information with the contents of Long’s letter to Cindy Ferguson, Detective Lappin obtained a search warrant for the premises at 1132 Apperson Way in Kokomo to search for “any handguns and ammunition.” (Exhibits p. 68). When Detective Lappin went to the Apperson Way location, Cindy Ferguson was present and told the officers that “the handgun” was in a storage shed. In the shed in a Nike shoebox, Detective Lappin found a “Colt 38 Special revolver handgun.” (Tr. p. 411). Subsequently, in the forensic laboratory test, bullets were fired from the revolver and were compared with two bullets retrieved from Andre White’s body and one spent bullet recovered at the scene. The expert witness testified that all three evidence bullets were fired from the same Colt 38 revolver that had been tied to Long.

A. Seizure of Jail Cell Correspondence

Long argued that the jail cell search warrant lacked probable cause because it was premised upon the anonymous hearsay tip. As heretofore discussed under Part I, the tip, as relevant to the jail search, was only as to Long’s whereabouts. Long’s implication as the shooter was otherwise adequately established. Detective Lappin obtained the search warrant after listening to the telephone conversations between Long and Kevin Thomas.

In these conversations, Long's girlfriend, Cindy Ferguson, was mentioned, and that Thomas should make contact with her concerning the "tennis shoes" which were "in a safe place now." (Exhibit 10, Exhibits pp. 11-14). As a result, Lappin obtained the warrant to search Long's jail cell. It was reasonable to do so in expectation that correspondence would be found bearing upon the murder investigation. Issuance of the warrant was not rendered invalid by the tip as to Long's incarceration in Grant County.

Long argues, somewhat in passing, that admission of the unmailed letter to Cindy Ferguson was improper as beyond the scope of the warrant. The warrant authorized a search for "any letters or written correspondence to Will G. Long." (Exhibit A, Exhibits p. 59-60) (Emphasis supplied). The unmailed letter was, of course not written to Long.

However, it was seized along with the total of eighteen documents. It was, therefore, in plain view of Grant County Officer Pauley, who actually executed the search warrant at the request of Detective Lappin. In any event, the objection posed was premised upon the anonymous tip as the only source for the probable cause required for issuance of the warrant.

In ruling upon Long's request for suppression of the items seized from his jail cell, the court correctly noted that Long did not have a reasonable expectation of privacy as to his jail cell. Cleary v. State, 663 N.E.2d 779, 783 (Ind. Ct. App. 1996). Accordingly, there was no error in admitting the unmailed letter from Long to Cindy Ferguson, and no further discussion of this issue is warranted.

B. Seizure of Handgun in Shoe Box

The handgun in the Nike shoebox was seized from a storage shed at the residence

of Charlene Smith, the mother of Cindy Ferguson. Cindy was present at the home when the officers arrived to execute the search warrant. She often stayed at that location.

After some conversation by Cindy with the officers, the Nike shoebox containing the gun was seized from the shed. At trial, Cindy testified that she had brought the gun to her mother's residence from her own house because she intended to get rid of it. She said that she had come into possession of the gun when it was brought to her house by Long and another person.

Long argues that the handgun was wrongfully admitted. In doing so, he bases his claim of standing to challenge the search of the premises in which he had no interest, upon the fact that he did hold an interest in the gun itself. Citing to Best v. State, 821 N.E.2d 419 (Ind. Ct. App. 2005), Long asserts that this admitted interest gives him standing.⁶

This would appear to be a curiously incriminating position. By achieving standing to challenge the search of the premises at 1132 N. Apperson Way, he seems to advance an argument that undercuts his assertion that the State failed to prove his guilt. In doing so, he thereby unmistakably demonstrates that error, if any, in admitting the handgun into evidence, is harmless beyond a reasonable doubt.

Except as to the conviction for Carrying a Handgun without a License, under

⁶ The Fourth Amendment to the U. S. Constitution focuses primarily upon the personal privacy expectation with respect to the place searched. Long concedes that he had no interest in the premises searched. (App. Br. p. 24). However, Article I, § 11 of the Indiana Constitution provides an additional basis for standing to attack the seizure of property. An interest in the property seized, as opposed to the places searched, will provide the requisite standing to attack the seizure. Peterson v. State, 674 N.E.2d 528 (Ind. 1996). See Best v. State, supra.

Count III, the judgment is in all other respects affirmed.

SHARPNACK, J., and MAY, J., concur.