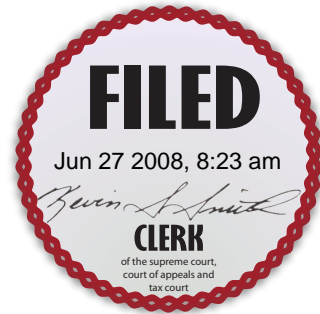


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**IN THE
COURT OF APPEALS OF INDIANA**

RANDALL THOMAS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-0710-CR-584

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable, Tonya Walton Pratt, Judge
Cause No. 49G01-0605-FA-91372

June 27, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Randall Thomas (Thomas), appeals his conviction and sentence for battery by means of a deadly weapon, a Class C felony, Ind. Code § 35-42-2-1.

We affirm.

ISSUES

Thomas presents two issues on appeal, which we restate as the following three:

- (1) Whether he was denied his Sixth Amendment right to confront the witnesses against him;
- (2) Whether he was denied his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor; and
- (3) Whether the trial court improperly considered an element of the crime as an aggravating circumstance.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of May 21, 2006, Mohamadou Ndiaye (Ndiaye) and Ahmed Dioum (Dioum) were working the night shift at a Marathon gas station in Indianapolis. Ndiaye's girlfriend was also in the store. It was store policy to lock the doors after midnight and to have customers make purchases through a window. At some point, however, Dioum went outside to smoke and left the doors unlocked. While the doors were unlocked, Thomas entered the store to pay for gas. Instead of leaving after paying, Thomas began "messaging" with Ndiaye's girlfriend. (Transcript p. 33). When Thomas refused to leave, Ndiaye and Dioum forced him out. On the way out, Thomas grabbed Ndiaye's pants.

Ndiaye yelled for Officer Freddie Haddad of the Indianapolis Police Department (Officer Haddad), who had pulled into the parking lot. Officer Haddad talked with Thomas, who was “clearly intoxicated.” (Tr. p. 73). Thomas eventually left the scene. Approximately one hour later, however, while Dioum was again outside the store, Thomas returned and fired eight shots at Dioum as Dioum ran back into the store. One of the bullets hit Dioum in the arm.

On May 25, 2006, the State filed an Information charging Thomas with Count I, attempted murder, a Class A felony, I.C. §§ 35-42-1-1 and 35-41-5-1, and Count II, battery by means of a deadly weapon, a Class C felony, I.C. § 35-42-2-1. Thomas waived his right to a jury trial. On March 1, 2007, the first day of Thomas’ bench trial, the State informed the trial court and the defense that Dioum would not be testifying because he was with his family in South Africa. However, the State said that it was ready to proceed with its case. Thomas’ counsel responded that Dioum’s testimony was crucial to Thomas’ defense and asked for a continuance of the trial so that he could either depose Dioum or call him as a witness at a later date. The trial court did not grant a continuance but bifurcated the proceeding so the defense could await Dioum’s return. The trial court scheduled a second day of trial and proceeded with the State’s case, during which the State entered surveillance video of the shooting into evidence.

On April 12, 2007, the trial court held a conference for the attorneys. The State informed the trial court and the defense that Dioum had returned to the United States and that he was in New York but that it would not be paying to have him brought to Indiana for the

second day of the trial. Thomas’ counsel responded, “I am under no financial obligation to fly some victim back here from New York or not.” (Tr. p. 274). On April 20, 2007, the bench trial concluded without Dioum being called as a witness. The trial court found Thomas guilty of battery by means of a deadly weapon and not guilty of attempted murder.

On May 4, 2007, the trial court held a sentencing hearing. The trial court found two aggravating circumstances—Thomas’ prior conviction for drunk driving and the heinous nature and circumstances of Thomas’ offense—and two mitigating circumstances—the undue hardship that long-term incarceration would cause to Thomas’ children and Thomas’ remorse. Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial court imposed a sentence of six years, all executed.

Thomas now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Confrontation Clause

Thomas first argues that he was deprived of his right under the Confrontation Clause of the Sixth Amendment to the United States Constitution, which provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” This right is applicable to state prosecutions through the Fourteenth Amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Thomas asserts that he was “denied his constitutional right to confront the alleged victim [Dioum].” (Appellant’s Br. p. 5). However, the essential purpose of the Sixth Amendment right of confrontation is to insure that the defendant has the opportunity to

cross-examine the *witnesses* against him. *Guy v. State*, 755 N.E.2d 248, 253 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*. Here, Dioum was not a witness at Thomas' trial, nor was any evidence presented in lieu of live testimony, such as a deposition, a videotaped statement, or hearsay. Therefore, the right of confrontation did not attach, and Thomas cannot claim a violation.

II. *Compulsory Process Clause*

In a related argument, Thomas contends that he was deprived of his right under the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor[.]" This right has also been made applicable to state prosecutions through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Again, Thomas makes his claim in reference to Dioum's failure to testify, apparently believing that Dioum's testimony would have aided his defense. However, Thomas never sought to compel Dioum to testify by issuing a subpoena. Therefore, he cannot now be heard to complain that he was deprived of his right to have compulsory process for obtaining a witness in his favor.

Furthermore, to the extent that Thomas argues that the State was responsible for making Dioum available as a witness, we know that "[t]he State cannot be compelled to call witnesses at the instance of the accused." *Beverly v. State*, 543 N.E.2d 1111, 1115 (Ind. 1989). The State is generally entitled to prove its case by evidence of its own choice. *Hines v. State*, 794 N.E.2d 469, 473 (Ind. Ct. App. 2003), *summ. aff'd* by 801 N.E.2d 634 (Ind.

2004), *reh'g denied*. As such, a defendant has the burden of seeing that witnesses who may aid in his or her defense are called. *Beverly*, 543 N.E.2d at 1115. Here, when the State declined to bear the expense of bringing Dioum to Indiana to act as a witness, Thomas declined as well. Thomas fails to explain how this constitutes a violation of the right to compulsory process.

III. Sentencing

Finally, Thomas argues that the trial court improperly considered an element of the crime as an aggravating circumstance. Specifically, Thomas maintains that the trial court relied upon the fact that he used a gun in the commission of the battery. It is true that a material element of a crime may not be used as an aggravating factor. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). Here, Thomas' use of a deadly weapon, *i.e.*, the gun, was an element of battery as a Class C felony. *See* I.C. § 35-42-2-1(a)(3) (“[T]he offense is . . . a Class C felony . . . if it is committed by means of a deadly weapon[.]”). However, Thomas fails to direct us to anything in the record that would indicate that the trial court found Thomas' use of a gun, standing alone, as an aggravating circumstance.

Both the chronological case summary and the trial court's oral sentencing statement reflect that the trial court found only two aggravating circumstances: Thomas' prior conviction for drunk driving and the heinous nature and circumstances of the crime. (Appellant's App. p. 13; Tr. pp. 443-45). Regarding the nature and circumstances of the crime, the trial court stated:

The Court finds that the facts of this case are -- are particularly heinous in that following the altercation at the gas station -- with -- with the gas station

employees, you had an opportunity to leave. The police officer, as -- as your attorney said was being kind and didn't arrest anyone, told everybody to go to their respective places and mind their respective businesses. Instead of you getting in the car with your aunt and going home, or wherever you were going, you stay in the area, you go over there to the liquor store, your client, and take your gun with you and come back to the gas station. All of this would have been avoided if you had done what the police officer told you to do which was leave. But you came back and you shot at this man eight times, and it's all on video. This man is running and you're shooting like you're in the wild, wild, west, which is totally unacceptable and totally aggravating. And there were two people in that gas station. Thank God only one bullet ricocheted and hit one person. You could have killed someone -- you could have killed two people potentially.

(Tr. pp. 444-45). The trial court's comments demonstrate that it was primarily concerned not with the fact that Thomas used a gun, but rather with Thomas' decision to return to the store after the opportunity for reflection and the way in which Thomas used the gun, firing eight wild shots into a store where two people were. While a trial court may not rely on an element of the crime as an aggravating circumstance, it may consider the particularized circumstances of the criminal act. *McElroy*, 865 N.E.2d at 589. The trial court did not abuse its discretion in sentencing Thomas.

CONCLUSION

Based on the foregoing, we conclude that Thomas was not deprived of his rights under the Confrontation Clause or the Compulsory Process Clause of the Sixth Amendment to the United States Constitution and that the trial court did not consider an element of Thomas' crime as an aggravating circumstance.

Affirmed.

BAKER, C.J., and ROBB, J., concur.