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IN THE
COURT OF APPEALS OF INDIANA

RUDOLPH V. WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-1004-CR-147
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R. W. Chamblee, Jr., Judge
Cause No. 71D08-0803-FB-30

September 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Rudolph V. Williams was convicted after a jury trial of robbery[1] as a Class C felony and admitted to being an habitual offender.[2] He appeals, raising the following restated issues:

I. Whether sufficient evidence was presented to support Williams' conviction for robbery; and

II. Whether the trial court erred when it concluded a witness was unavailable.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 10, 2008, Williams entered a CVS Pharmacy in South Bend, Indiana. There, he proceeded to the liquor aisle, placed several bottles of Absolut vodka in his bag, and walked toward the store's exit. The store manager, Michael Perkins, observed Williams placing the bottles into his bag. *Tr*. at 161. As Williams was walking toward the exit, Perkins positioned himself between Williams and the exit and asked Williams to put the alcohol back. Without speaking, Williams pulled out a knife and held it in his hand for Perkins to see. *Id*. at 165. Another CVS employee, Bobbi Hunt, saw Perkins tug the bag and Williams yank it away. *Id*. at 181. Williams then ran out of the building.

The State charged Williams with robbery while armed with a deadly weapon as a Class B felony and admitted being an habitual offender. Perkins did not attend the trial, and the State offered his deposition in lieu of live testimony. The trial court found that Perkins was unavailable and admitted the deposition over Williams' objection. A jury

[1] *See* Ind. Code § 35-42-5-1.

[2] *See* Ind. Code § 35-50-2-8.

found Williams guilty of robbery, as a Class C felony, which was a lesser included offense.

Williams admitted to the habitual offender count and was sentenced to six years for the Class C felony robbery, with a habitual offender enhancement of an additional six years, forming an aggregate sentence of twelve years. Williams now appeals.

DISCUSSION AND DECISION

I. Sufficient Evidence

Williams contends the State failed to prove by substantial evidence of probative value the essential elements of robbery. Specifically, Williams contends that the evidence is insufficient to prove that he took the alcohol from the CVS Pharmacy by use of force.

Robbery is defined at Ind. Code § 35-42-5-1:

> A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Class C felony.

Our standard of review for claims of sufficiency of the evidence is well settled. When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. *Mork v. State*, 912 N.E.2d 408, 411 (Ind. Ct. App. 2009) (citing *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)). We do not reweigh the evidence or assess witness credibility. *Id*. We consider conflicting evidence most favorably to the trial court's ruling. *Id*. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable

doubt. *Id*. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id*.

In *Rowe v. State*, 496 N.E.2d 585 (Ind. Ct. App. 1986), a grocery store employee was carrying a sack of money when the defendant, Rowe, came from behind, took the sack and ran. *Id*. at 591. The employee who was holding the money sack, Mansfield, testified that he did not wrestle with Rowe because it happened too quickly, but another employee who witnessed the incident testified that Rowe and Mansfield tussled briefly before Rowe ran off with the sack. *Id*. at 590. This court stated that the acts of grabbing the sack and tussling with the employee before running off with the sack constituted taking it by force for the purposes of a charge of robbery. *Id*.

The facts of *Rowe* are nearly indistinguishable from this case. Hunt testified that before Williams exited the store, Perkins tugged the bag of alcohol and Williams had to yank it away. Such evidence was sufficient to support a finding that Williams took the alcohol by force. Although Williams points to conflicting evidence, it is for the trier of fact to weigh such conflicting evidence and determine a factual conclusion. *Mork*, 912 N.E.2d at 411.

II. Right of Confrontation

Williams also contends he was denied his rights of confrontation under the Sixth Amendment to the United States Constitution[3] when the trial court allowed the deposition of Perkins to be read into evidence after a finding that Perkins was

[3] Williams also contends that his right of confrontation under Article 1, Section 13 of the Indiana Constitution was violated by the admission of the deposition testimony. He fails, however, to develop an independent analysis under our State Constitution, and, accordingly, we deemed the argument waived. *See Carroll v. State*, 822 N.E.2d 1083, 1088 (Ind. Ct. App. 2005).

unavailable. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against him." The Fourteenth Amendment makes this right of confrontation applicable to the states. *Jackson v. State*, 735 N.E.2d 1146, 1150 (Ind. 2000). 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. Id. The constitutional right of confrontation requires that the prosecution either produce the declarant or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002).

Whether a witness is unavailable for purposes of the Confrontation Clause is a question of law. *See*, *Fowler v. State*, 829 N.E.2d 459, 465-66 (Ind. 2005), citing *Jennings v. Maynard*, 946 F.2d 1502, 1504 (10th Cir. 1991) ("We review an issue of unavailability under the Confrontation Clause de novo.").

A witness is unavailable for purposes of the Confrontation Clause requirement if the State has made a good faith effort to obtain the witness's presence at trial. *Garner*, 777 N.E.2d at 724. Even if there is only a remote possibility that an affirmative measure might produce the declarant at trial, the good faith obligation *may* demand effectuation. *Id*. at 724-25 (emphasis in original). Reasonableness is the test that limits the extent of alternatives the State must exhaust. *Id*.

In *Tiller v. State*, 896 N.E.2d 537 (Ind. Ct. App. 2008), the prosecution had contact with a witness for several weeks leading up to trial, only to find out the witness fled the state in the days before the trial out of fear of the defendant. *Id*. at 544. At that point, the

prosecutor personally spoke with the witness but could not convince him to appear at trial. *Id*. Further, an investigator attempted to locate the witness, additional phone calls to the witness were attempted unsuccessfully, and a body attachment was issued. *Id*. This court concluded the State made a good faith effort to secure the witness's attendance at trial. *Id*. at 546. *See also Ingram v. State*, 547 N.E.2d 823 (Ind. 1989) (finding that State made sufficient showing that witness was unavailable where witness did not respond to subpoena; detective inquired at her last known address, her place of employment, foster home where her children lived, her parents and aunt and uncle, and various business establishments likely to have contact with her); *Hammers v. State*, 502 N.E.2d 1339 (Ind. 1987) (finding State established witness was unavailable to testify where warrant had been issued for his arrest, that diligent efforts were made to produce him, and that family members advised he was in Tennessee but did not know how to contact him).

In this case, Perkins was previously subpoenaed several times as the case was reset multiple times. *Tr*. at 6. The State was in contact with Perkins leading up to the previous trial dates. After failing to appear for a scheduled deposition, Perkins was present for a deposition on October 25, 2009. *Id*. at 8, 316. Perkins then failed to respond to a subpoena sent on November 13, 2009. *Id*. at 6. An investigator was sent to his last known address, but the residence was found empty and no forwarding address had been left with the landlord. *Id*. The State then pursued Perkins at the address of his child's mother, but she could offer no help as she indicated she had not seen him for quite some time. *Id*. The State also called the phone number they had for Perkins several times and

left messages, but Perkins did not respond. *Id*. The State could not contact him at work as he terminated his employment at CVS in August 2009. *Id*. at 160.

Here, the State pursued Perkins in various ways prior to trial. Comparing the State's attempts at finding Perkins to the attempts made in *Tiller* and similar cases, the trial court did not err in concluding that the State made a good faith effort to procure Perkins' attendance.

Affirmed.

RILEY, J., and BAILEY, J., concur.