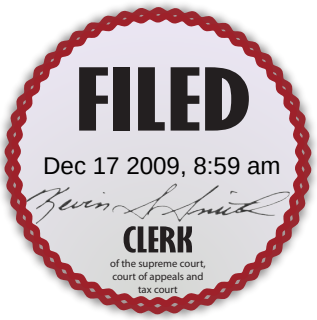


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| TERRY LYNEM, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0905-CR-274 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula E. Lopossa, Senior Judge
Cause No. 49G02-0812-FA-288157

**December 17, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Terry Lynem appeals his convictions and eighty-nine-year sentence for one count of Class A felony attempted robbery, one count of Class B felony robbery, five counts of Class B felony attempted robbery, one count of Class C felony battery, one count of Class C felony criminal recklessness, and one count of Class A misdemeanor carrying a handgun without a license. We affirm.

## Issues

The restated issues before us are:

I. whether the trial court acted appropriately after being notified that the jurors received improper extraneous information during trial;

II. whether the trial court properly denied Lynem's mistrial motion;

III. whether there is sufficient evidence to support Lynem's convictions; and

IV. whether Lynem was properly sentenced.

## Facts

The evidence most favorable to the convictions reveals that Gregory Arnold, Jr., owns Big Engine Entertainment, a recording studio in Indianapolis. On December 18, 2008, a number of people were at the studio, including some of Arnold's relatives, friends, employees, and children. Arnold had known Lynem for about ten years.

During the evening, Arnold's sister Shontez Simmons was outside smoking a cigarette when she was approached and greeted by her cousins Antwane Walker and

Antonio Walker. Antwane and Antonio went into the studio but came right back out. Soon thereafter, Antwane and Antonio returned, accompanied by Lynem, Curtis Stokes, Johnnie Stokes, and a man named Marcus whose last name is unknown. Johnnie was carrying a black trash bag.

Once inside the studio, Antwane and Antonio went into Arnold's office, where he was with Andrew Steele. Antwane and Antonio greeted Arnold, then asked to speak to Steele in the hallway. Once all three were in the hallway, Antonio pulled out a handgun, put it in Steele's face, and said "Get down, you know what this is." Tr. p. 479. Meanwhile, at the same time Johnnie, who was also in the hallway, pulled an assault rifle out of the trash bag he was carrying and began firing it, also saying "Get down, you know what this is." Id. at 480. Arnold managed to close the door to his office, after Antwane initially had prevented him from doing so. He then retrieved a handgun, opened his office door, and fired at Antonio.

While this was occurring, Lynem and Marcus approached Big Engine employee Edriese Phillips. Lynem had been friends with Phillips for several years. Lynem pointed a revolver at Phillips's stomach, and he and Marcus demanded that Phillips "[c]ome on with that s*** out of your pockets." Tr. p. 402. When Phillips said he had nothing in his pockets, Lynem struck him in the face with the revolver, breaking Phillips's glasses. Lynem or Marcus then reached into Phillips's pockets and removed $200.[1]

[1] It is unclear from Phillips's testimony whether Lynem or Marcus reached into his pockets and removed the money.

Lynem, Antwane, Antonio, Curtis, Johnnie, and Marcus left the building, with Antwane firing towards it as he left. After the shooting stopped and people began calling 911, it was discovered that Big Engine employee Collin Moore had been shot, leaving him paralyzed. Police officers dispatched after the incident soon located Lynem, Antwane, and Curtis walking together down a street near the studio. Eight days after the incident, Johnnie called Arnold and offered him $5000 in exchange for Arnold agreeing not to "press charges." Id. at 524.

On December 22, 2008, the State charged Lynem with one count of Class A felony attempted robbery, one count of Class B felony robbery, eight counts of Class B felony attempted robbery, one count of Class C felony battery, one count of Class C felony criminal recklessness, and one count of Class A misdemeanor carrying a handgun without a license. The State later filed an allegation that Lynem is an habitual offender.

A jury trial was held on March 9 through 13, 2009, for Lynem and four co-defendants. The trial court granted Lynem's motion for a directed verdict on three of the Class B felony attempted robbery counts, and the jury found him guilty of the remaining counts. Lynem waived a jury trial on the habitual offender allegation, and the trial court found that he is an habitual offender. The trial court sentenced Lynem as follows: thirty years for Count I, the Class A felony attempted robbery conviction, enhanced by thirty years for the habitual offender finding; twenty years for Count II, the Class B felony robbery conviction, consecutive to Count I; ten years for each of the five Class B felony attempted robbery convictions, concurrent with Count I; eight years for the Class C

felony battery and criminal recklessness convictions, concurrent with each other but consecutive to Count II; and one year for the Class A misdemeanor carrying a handgun conviction, to be served consecutively. Thus, the aggregate sentence was eighty-nine years. Lynem now appeals.

## Analysis

### *I. Jury's Receipt of Extraneous Information*

Lynem's first contention is that the trial court reacted improperly after being advised that the jury had been exposed to potentially prejudicial extraneous information during trial. Specifically, after the jury recessed for lunch after the State's first witness testified, counsel for one of Lynem's co-defendants informed the trial court that he had overheard a juror telling a member of the court staff that she had seen papers from the Marion County Sheriff's Department in the jury room. These papers, accidentally left there by a Sheriff's deputy, listed Lynem and his co-defendants' names and indicated that they were being transported to the courtroom from the Marion County jail. This juror told the other jurors, correctly, that the sheets meant the defendants were being held at the jail during trial and listed their cell blocks.

One of Lynem's co-defendants moved for a mistrial, and counsel for Lynem joined in the motion. The State suggested that the trial court question the jurors individually about the papers to help determine whether a mistrial was necessary. Counsel for Lynem and his co-defendant all objected to there being any questioning of the jurors, believing it would improperly emphasize the extraneous information.

The trial court proceeded to bring the jurors into court one at a time to question them about the papers, after telling them collectively that "there has been something come to the Court's attention . . . ." Tr. p. 187. It also told the jurors collectively, "So remember not to talk about this matter among yourselves unless you're all in the jury room." Id. at 188. It then first brought in the juror who had told the other jurors what the documents meant. The juror stated that all of the jurors had discussed their belief that the defendants were incarcerated during trial was irrelevant "because they were going to be weighing the evidence by itself, not the situation the defendants are in." Id. at 201. The trial court then allowed the juror to leave, admonishing her not to discuss the matter with her fellow jurors.

The trial court then brought in the remaining eleven jurors and two alternates, showed them the documents, asked them whether they had viewed them, and asked whether the documents would affect their ability to be fair and impartial. After the second juror was questioned, the trial court admonished him, "Don't talk about this . . . ." Id. at 206. None of the other jurors, however, were admonished in any way after they were questioned. Additionally, each of the remaining jurors was told he or she could go home after being questioned and was advised to return the next morning. None of the attorneys for any of the five co-defendants objected to this procedure. When the jury assembled the next morning, the trial court mentioned nothing about the prior day's events.

Several of the jurors had not personally seen the disputed documents until being brought in for questioning and shown them by the trial court. Each of the jurors expressed that the documents would not affect their ability to be fair and impartial. One of the jurors stated, "I don't believe so" when asked whether the documents would affect her ability to remain fair and impartial, but she further explained that she had already assumed the co-defendants were in custody because they were accompanied by five Sheriff's deputies. Id. at 215.

On appeal, Lynem does not argue that the jurors' exposure to the papers, and their indication that he was being held in jail during trial, by itself automatically necessitated a mistrial. That, however, seems to have been Lynem and his co-defendants' position at trial. Now, Lynem asserts only that the trial court employed an improper procedure in response to the jury's exposure to extraneous information. A defendant may not raise one claim of error at trial and raise a different claim on appeal; any such new appellate claim is waived. See Houser v. State, 823 N.E.2d 693, 698 (Ind. 2005).

Furthermore, "Indiana does not take the position that the mere possibility that extrinsic evidence could have affected the jury's verdict is sufficient to require a mistrial. Rather, a mistrial is an extreme remedy that is warranted only when less severe remedies will not satisfactorily correct the error." West v. State, 758 N.E.2d 54, 55 (Ind. 2001). If there is a possibility the jury has been exposed to extraneous material having potential to taint the jury's verdict, upon motion by the defendant the trial court is required to interrogate and admonish the jurors collectively and individually. Id.

Our supreme court set forth the specific procedure a trial court is required to follow in such cases in Lindsey v. State, 260 Ind. 351, 295 N.E.2d 819 (1973).[2] The Lindsey court explained:

> If the risk of prejudice [because of exposure to extraneous information] appears substantial, as opposed to imaginary or remote only, the court should interrogate the jury collectively to determine who, if any, has been exposed. If there has been no exposure, the court should instruct upon the hazards of such exposure and the necessity for avoiding exposure to out-of-court comment concerning the case. If any of the jurors have been exposed, he must be individually interrogated by the court outside the presence of the other jurors, to determine the degree of exposure and the likely effect thereof. After each juror is so interrogated, he should be individually admonished. After all exposed jurors have been interrogated and admonished, the jury should be assembled and collectively admonished, as in the case of a finding of "no exposure." If the imperiled party deems such action insufficient to remove the peril, he should move for a mistrial. Obviously, if at any stage the court believes the peril to be substantial and uncurable, it should declare a mistrial sua sponte.

Lindsey, 260 Ind. at 358-59, 295 N.E.2d at 824.

Clearly, the trial court did not follow the Lindsey procedure to a "T." Indeed, some of the trial court's actions might have been counter-productive, such as showing the Sheriff's Department documents to all the jurors individually, thus exposing some jurors to the disputed information who previously had not seen it. Neither Lynem nor any of his co-defendants, however, requested that the trial court follow the Lindsey procedure.

[2] Lindsey specifically addressed a case of exposure to media publicity during trial, but the procedure it outlined has been applied to many other types of jury exposure to extraneous material or information. See West, 758 N.E.2d at 55 n.1.

Instead, they insisted on an immediate mistrial, in contravention of West's holding that jury exposure to potentially prejudicial information does not automatically require a mistrial.

The trial court devised a procedure that it believed would assess the necessity of granting a mistrial, without input from Lynem and the other defendants. After questioning the jurors, it was satisfied that they could remain fair and impartial despite exposure to the Sheriff's documents. Our review of the questioning confirms this conclusion. None of the jurors expressed concern about their ability to remain fair and impartial. Several of them stated they had already assumed the defendants were in law enforcement custody because of the presence of multiple Sheriff's deputies around them. The jury also was instructed, as is usually done in criminal cases, that the fact of the defendant's arrest cannot be considered any evidence of guilt. Lynem fails to develop an argument that the jury's knowledge that he failed to bond out of jail and was in law enforcement custody during trial was so fatally prejudicial that the trial court's sua sponte failure to strictly follow the Lindsey procedure requires reversal of his convictions.

### *II. Motion for Mistrial*

Lynem's next argument is closely related to his first. He contends the trial court erred in denying his motion for mistrial made on the morning after the trial court interrogated the jurors regarding the extraneous information. The basis for the mistrial motion was the trial court's failure to admonish the jurors after individually questioning them and permitting them to go home for the evening.

Indiana Code Section 35-37-2-4 requires that before allowing a jury to separate at the end of the day, certain admonishments must be given. However, although these admonishments are mandatory, a defendant waives any claim of error in the failure to give them unless he or she objects at the time the failure occurs. Lake v. State, 565 N.E.2d 332, 335 (Ind. 1991). Lynem's failure to contemporaneously object to the trial court not giving the required admonishments, and his waiting until the next morning to object, waives any claim of error on this point. See Arthur v. State, 264 Ind. 419, 421, 345 N.E.2d 841, 842 (1976) (holding defendant waived claim of error in failure to give required statutory admonishments when he did not contemporaneously object, and instead waited until trial reconvened to raise objection).

### *III. Sufficiency of the Evidence*

Next, Lynem contends there is insufficient evidence to support his convictions. When we review the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). "It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction." Id. When confronted with conflicting evidence, we must consider it in a light most favorable to the conviction. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

Lynem contends that the testimony of Phillips, Lynem's victim, was incredibly dubious and not corroborated by any other testimony or evidence. "Within the narrow limits of the 'incredible dubiosity' rule, a court may impinge upon a jury's function to judge the credibility of a witness." Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We may reverse a conviction if a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence. Id. This is appropriate only in the event of inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Id. "Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." Id.

Lynem argues Phillips's testimony is inconsistent in some respects with statements he made to police after the incident occurred. Lynem also observes that he was not one of the persons named in the initial police dispatch as a suspect in the crime. We note, however, that "[t]he incredible dubiosity rule applies to conflicts in trial testimony rather than conflicts that exist between trial testimony and statements made to the police before trial." Buckner v. State, 857 N.E.2d 1011, 1018 (Ind. Ct. App. 2006).

Lynem also argues that Phillips's trial testimony varies from the testimony of some of the other witnesses in various particulars of precisely what occurred on the night of the incident. "As we have previously clarified, the standard for dubious testimony is inherent contradiction, not contradiction between witnesses' testimony." Altes v. State, 822 N.E.2d 1116, 1123 (Ind. Ct. App. 2005), trans. denied. Furthermore, juries are free

to accept some parts of a witness's testimony while rejecting other parts. See May v. State, 810 N.E.2d 741, 744 (Ind. Ct. App. 2004). Thus, it was not necessary for all of the State's witnesses to agree on every detail of what occurred during what was unquestionably a chaotic incident involving many people. What is important is that Phillips's trial testimony was internally consistent, and he adhered to his testimony directly implicating Lynem in the mass robbery, despite vigorous cross-examination. See Ferrell v. State, 746 N.E.2d 48, 51 (Ind. 2001).

Additionally, although no other State's witness directly implicated Lynem, Phillips's testimony was not entirely uncorroborated. Shontez Simmons testified that she saw Lynem walk into the building with Antonio, Antwane, Curtis, Johnnie, and Marcus; shortly thereafter, Simmons heard gunfire erupting and she ran away from the studio.[3] Also, shortly after the incident, police apprehended Lynem as he was walking in a group with Antwane and Curtis near the studio.[4] Although no other witness besides Phillips directly implicated Lynem in any criminal activity, this circumstantial evidence, combined with Phillips's testimony, is sufficient to support Lynem's convictions. Any inconsistencies in the evidence, or the weight to be given Phillips's testimony, were for the jury to consider, and we will not second-guess its determination.

[3] Lynem asserts Simmons did not state that Lynem went into the studio. In fact, we find that on direct examination Simmons stated that "Terry . . . walked in the building." Tr. p. 109.

[4] Lynem notes that police did not find any money on him, though Phillips testified he had $200 taken from him; we noted earlier that it was unclear whether Lynem or Marcus took the money. As for Lynem being unarmed when police apprehended him and Phillips's testimony that he had a gun, it is not inconceivable that he would have disposed of a firearm after fleeing the studio.

### *IV. Sentence*

Lynem's final challenge is to his sentence. We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Lynem's first contention is that the trial court abused its discretion in failing to find a mitigating circumstance, namely alleged hardship to his dependents. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons

given for imposing sentence, the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Although hardship to dependents may be a mitigating factor in some cases, it is not a mandatory mitigator. See Comer v. State, 839 N.E.2d 721, 730 (Ind. Ct. App. 2005), trans. denied. It is entirely proper not to assign any mitigating weight to the alleged hardship incarceration will have on a defendant's dependents where the defendant was not supporting those dependents. See id. Here, although Lynem has four children, the presentence report indicates that Lynem does not pay support for any of them. Lynem also described the extent of contact with his children as "on and off by phone." Presentence Report p. 14. We cannot say the trial court abused its discretion in declining to identify as mitigating the mere fact that Lynem has children whom he occasionally speaks to by phone.

Lynem also contends that his eighty-nine-year aggregate sentence is inappropriate. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged

with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." Id.

Regarding the nature of the offenses, Lynem contends he was a relatively minor participant in the incident; the prosecutor at the sentencing hearing agreed that Lynem's involvement was "lesser" than that of Johnnie Stokes and Antonio Walker. Tr. p. 1138. Still, the evidence most favorable to the convictions, as we discussed, reveals that Lynem was a willing accomplice and active participant in a mass robbery attempt. Children were present at the scene and clearly were traumatized. Lynem was acquainted with many of the victims, including Phillips, the individual he personally robbed. One individual, Collin Moore, was left permanently disabled as a result of the incident; even if Lynem did not personally shoot Moore, he bears some responsibility for his injuries. The number of victims, the youth of some of the victims, Lynem's previously friendly relationship with some of the victims, and the injury suffered by Moore make this an egregious criminal incident.

As for Lynem's character, he has a lengthy criminal history. His first conviction was in 1988, when he was twenty years old, for Class A misdemeanor criminal conversion. Since then, he has accumulated one additional conviction for Class A misdemeanor conversion, one for Class B misdemeanor disorderly conduct, two for Class A misdemeanor resisting law enforcement, one for Class D felony possession of cocaine

or a narcotic drug, and four for Class D felony theft. He has had probation revoked on four occasions. He has numerous arrests for other offenses that either were not filed or were dismissed for various reasons. He has numerous Department of Correction violations from previous periods of incarceration. The presentence report indicates that Lynem uses marijuana regularly and drinks considerably, "about a six pack a day," but he has not sought treatment for substance abuse issues. Presentence Report p. 16. In fact, he was ordered to undergo substance abuse treatment following previous convictions, but he appears to have been non-compliant with the orders. Although Lynem's previous offenses were non-violent and not as severe as the present offenses, the sheer number of convictions Lynem has accumulated over the last twenty years, his inability to complete probation successfully, his frequent violation of DOC rules, and his apparent refusal to confront substance abuse issues reflect very poorly upon his character.

We cannot say Lynem's aggregate eighty-nine-year sentence is an "outlier" sentence that warrants appellate correction. Lynem makes no argument that his sentence approaches the maximum possible he faced for the numerous convictions plus the habitual offender enhancement. In light of the egregiousness of the incident in which Lynem was directly involved and clear indicators of his poor character, we conclude that his sentence is not inappropriate.

**Conclusion**

Lynem has waived his claims of error with respect to how the trial court responded to his first mistrial motion and its denial of his second mistrial motion. There is sufficient evidence to support Lynem's convictions, and he was properly sentenced. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.