Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEYS FOR APPELLANT:

GREGORY F. ZOELLER
Attorney General of Indiana

CYNTHIA L. PLOUGHE
Deputy Attorney General
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

JOHN L. TOMPKINS
Brown Tompkins Lory & Mastrian
Indianapolis, Indiana

FILED
Jan 19 2011, 9:36 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-1004-CR-412
	)	
MICHAEL A. WILLIAMS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0904-MR-37416

January 19, 2011

MEMORANDOM DECISION – NOT FOR PUBLICATION

BROWN, Judge

The State of Indiana appeals the trial court's partial grant of motions to suppress filed by Michael Williams. The State raises three issues, which we revise and restate as whether the court erred in granting in part the motions to suppress. We reverse in part.

This is an interlocutory appeal from the court's rulings on motions to suppress, and Williams's trial for murder has not yet occurred. According to the State, this case involves a "drug deal gone bad" and that Williams and another person, Norman Thompson, conspired to kill and did kill James Trotter after Trotter refused to return $20,000. Appellant's Appendix at 49. According to the State, sometime after Trotter was murdered, Thompson was also murdered. The State indicates that its case against Williams will include testimony from William Moore, who knew Trotter, and Erik Edwards, who knew both Trotter and Thompson.

The facts are that on July 5, 2008, James Trotter was killed at his residence. Police later discovered Williams and his child at a house and an AK-47 assault rifle in a closet of the house during a protective sweep. On April 7, 2009, the State charged Williams and Norman Thompson with the murder of Trotter. On May 29, 2009, Williams filed two motions to suppress. Williams filed a Motion to Suppress, and Memorandum in Support of Motion to Suppress requesting the court to suppress all evidence obtained during the search of his residence and argued that the search violated the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution and that the probative value of the weapons and contraband seized was substantially outweighed by the unfair prejudice that the evidence would create in the minds of prospective jurors. Williams argued that he was handcuffed and secured in

a squad car when the search of his residence began and that there was no danger that he would gain access to anything in his residence that would jeopardize officer safety or the preservation of evidence.

Williams also filed a Motion to Suppress II and supporting Memorandum requesting the court to suppress all alleged hearsay statements attributed to Trotter and Thompson. Williams argued that admission of the alleged statements would violate his right to confront witnesses against him under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution. On June 8, 2009, Williams filed a Supplemental Memorandum in Support of Motion to Suppress II (Confrontation Rights), in which he argued that "[a]ny decision accepting a narrower right than the one that existed in 1791 is erroneous" and requested the court "to reject all historically invalid Sixth Amendment exceptions including but not limited to co-conspirator exceptions . . . ." Appellant's Appendix at 34.

On October 22, 2009, the court held a hearing on the motions to suppress, at which Indianapolis Metropolitan Police Detective Condon testified regarding the circumstances surrounding the arrest of Williams and discovery of a rifle. The parties presented arguments. At the end of the hearing, the court instructed the parties to file briefs on the suppression issues and a submission addressing the various alleged hearsay statements at issue.

On November 20, 2009, the State and Williams filed a "State of Indiana and Defendant's Summary of Arguments Relating to the Admissibility of Co-Conspirator Statements, Statements Made by the Victim and 404(B) Evidence with Supporting Case

Law Preliminarily Introduced at the October 22, 2009 Suppression Hearing." Id. at 46. In the Summary, the State described the evidence it desired to present at trial and its theory of its case against Williams. Also in the Summary, the State and Williams set forth their respective positions regarding whether certain testimony of William Moore and Erik Edwards should be admissible. In particular, the State indicated it would present the testimony of Moore, who would testify that he drove Trotter to a grocery store on or about July 1, 2008, and waited in the vehicle while Trotter went inside to meet with Williams. Moore would also testify that Trotter returned to the vehicle, pulled a stack of money out of his pocket, indicated that it was $20,000, and stated: "Dude trusted me with his money. I was supposed to get him something. But I'm just gonna take off with it. F--- him." Id. at 87.

The State further indicated it could show, in part by the testimony of Edwards, that Williams and Thompson conspired to murder Trotter. Edwards would testify that he was with Trotter at Trotter's house when he saw Williams and Thompson drive by the house and heard Trotter "growl." See id. at 85. Edwards would testify that Thompson called him as Thompson and Williams drove by Trotter's house and asked Edwards to keep Trotter on the porch and "[s]tay outside with him." Id. at 79. Edwards refused, and Thompson told Edwards to "come over." Id. Edwards met with Thompson and Williams on July 5, 2008, and he heard Thompson tell Williams to "[g]o get that" and Williams retrieved a rifle. Id. at 81. Edwards would also testify that he later called Trotter to warn him that Williams and Thompson were on their way to Trotter's house, and Trotter stated: "F--- them." Id. While still on the phone with Trotter, Edwards heard gunshots.

Also on November 20, 2009, Williams filed a Defendant's Post-Hearing Motion to Suppress and supporting Memorandum in which he argued that the police created their own emergency, that the officers had no basis for extending the protective sweep to include a search of the entire residence, and that the handguns and contraband seized from the house had no or minimal probative value but that the prejudice by displaying the visually compelling items to the jury would be great and unfair. On November 25, 2009, the State filed its response and Memorandum in Opposition to Said Motion presenting arguments in support of the warrantless entry into the house, of a lawful protective sweep, and of the probative value of the evidence.

On February 2, 2010, the court issued two rulings. In the first, with respect to hearsay, the court granted Williams's motion to suppress statements attributed to Trotter and found that Evidence Rules 803(1), (2), and (3) did not apply. The court denied in part and granted in part Williams's motion to suppress the alleged statements of Thompson. The court found that a conspiracy between Thompson and Williams existed and that alleged statements of Thompson after Thompson told Williams to "go get that" (referring to a rifle) were admissible as statements of a co-conspirator. Id. at 102. The court also found that the alleged statements of Thompson during a phone call to Edwards in which Thompson told Edwards to keep Trotter outside were not admissible. The court stated: "[t]he fact that [Thompson and Williams] were driving by Trotter's house, in combination with Thompson's request to keep Trotter on the porch, may signify a plan on Thompson's part, but the goal of the plan is not particularly clear." Id. The court also denied Williams's motion to suppress the alleged statements of Thompson after the

killing which were intended to keep Edwards from sharing any of the information he had learned.

In its other ruling, the court addressed the admissibility of the rifle discovered at the house following the arrest of Williams. The court noted that "it makes sense that police would not want to let a murder suspect leave a house while carrying a toddler who could be used as a shield" and found that "[s]olid reasoning justified the decision" by police to order Williams to leave his child inside the house. Id. at 109. The court also noted that "[b]ecause the child was crying, and because they had reports of weapons in the house, law enforcement could legitimately decide to check after the child's wellbeing." Id. However, the court also noted while the officers did not know if someone else was in the house, they were "not so worried that Detective Condon, without calling for backup, would push his way past a resisting door such that he could display his head to anyone who might want to do him harm" and that "[t]o say these officers were sending mixed signals about their needs, desires and motivations is an understatement." Id. at 110. The court observed that eight officers approached the house and looked for "signs of life" and that "[t]he only people they saw were Williams and his child." Id. at 112. The court also found that the rifle should not be suppressed on the basis that it violated Evidence Rule 403, finding that "[i]t does not appear there is any basis for the reasonable suspicion necessary to justify the protective sweep," and granting Williams's motion to suppress the rifle. Id.

The issue is whether the trial court erred in granting in part the motions to suppress. Our standard of appellate review of a ruling on a motion to suppress is similar

to other sufficiency issues. State v. Quirk, 842 N.E.2d 334, 340 (Ind. 2006). We will not reweigh the evidence and the record must disclose substantial evidence of probative value that supports the trial court's decision. Id.

The State argues that the court erred in suppressing: (A) alleged statements of Trotter and Thompson; and (B) evidence of a rifle obtained during a protective sweep. We will address each argument.

A. Admissibility of Alleged Statements

Hearsay is an out of court statement offered to prove the truth of the matter asserted and is inadmissible unless it falls under an exception. Pelley v. State, 901 N.E.2d 494, 504 (Ind. 2009) (citing Ind. Evidence Rule 801(c), 802), reh'g denied. We address the alleged statements of Trotter and Thompson separately.

1. Statements of Trotter

The State argues that certain alleged statements of Trotter to Moore and Edwards are not inadmissible.

a. Statements of Trotter to Moore

The State argues that Trotter's statements to Moore after exiting the grocery store and entering the vehicle with Moore that "dude trusted me with his money, he thought I was gonna get something for him, but I'm just gonna take off with it, f--- him" met the requirements for the present sense impression exception under Evidence Rule 803(1) to the hearsay rule. Appellant's Brief at 9. The State further argues that "the State had no intention of presenting evidence that Trotter was at the store for a drug deal" and thus that "Evidence Rule 404(b) is inapplicable," and that even if the meeting was a drug deal,

"such evidence can be used to establish a motive for charged conduct" and would thus not be inadmissible under Evidence Rule 404(b). Id. at 10.

Williams argues that "even if a rule or exception could be established to support the admission of these statements none of the State's asserted justifications outweigh a defendant's right to confront and cross-examine his accusers . . . ." Appellee's Brief at 4. Williams argues that Moore admitted to being involved in drug deals and thefts. Williams further argues that "[t]here are also facts about Trotter's state of mind and his ability to perceive and recall events that hearsay witnesses cannot establish, but which are essential to establishing what weight to give Trotter's alleged statements" and that "[t]hese facts are also critical to a court determining whether Trotter's 'present sense impression' was reliable or clouded by his known drug use." Id. at 5.

Hearsay statements may be admitted into evidence if they qualify as a present sense impression, which is defined as "[a] statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter." Ind. Evidence Rule 803(1). This rule requires that the statement describe or explain the event or condition during or immediately after its occurrence, and the statement must be based upon the declarant's perception of the event. Palacios v. State, 926 N.E.2d 1026, 1032 (Ind. Ct. App. 2010).

Here, the State indicated that it would present the testimony of Moore and that Moore would testify that he drove Trotter to a grocery store and waited in the vehicle while Trotter went inside to meet with Williams. Moore would also testify that after Trotter returned to the vehicle, Trotter pulled a stack of money out of his pocket and

made the statement about taking off with Williams's money. Trotter also told Moore he had met with Williams and that the cash was $20,000. Based on the record and the fact that the challenged statements were made immediately after Trotter met with Williams and before Trotter had an opportunity to reflect on the event, we conclude that the alleged statements regarding Trotter's meeting and conversation with Williams constitute present sense impressions. See Amos v. State, 896 N.E.2d 1163, 1167 (Ind. Ct. App. 2008) (holding that the declarant's statements about what another person had told the declarant were admissible under the exception to the hearsay rule for present sense impressions where the declarant perceived the event of the other person's comments and the declarant made the statements about what the other person said immediately after the conversation had ended), trans. denied; see also U.S. v. Danford, 435 F.3d 682, 687 (7th Cir. 2006) (holding that the declarant's statements were admissible under the present sense impression exception to the hearsay rule where approximately two weeks before the crime the declarant had a conversation with the defendant regarding disarming a store alarm and immediately following that conversation told the witness what had happened), reh'g denied, reh'g en banc denied.[1]

In addition, we note that Evidence Rule 803(3) provides an exception to the hearsay rule for statements of a "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) . . . ." See Ross v. State, 676 N.E.2d 339, 345 (Ind. 1996) (noting that

[1] We have observed that federal courts' interpretation of the Federal Rules of Evidence may be of some utility because of the similarity between the Indiana Rules of Evidence and the Federal Rules of Evidence. Palacios, 926 N.E.2d at 1033 n.3 (citations omitted).

admissible statements include those offered "to show the intent of the victim to act in a particular way"). Trotter's statements show that he intended to "take off with" the $20,000 he had received from Williams. These statements are relevant to Williams's motive for committing the murder and are therefore admissible under the hearsay exception for then-existing state of mind. See Pelley, 901 N.E.2d at 504 (holding that a declarant's statements showed his intent to act in a particular way to restrict the defendant's activities, were relevant to show the defendant's motive for committing murders, and were therefore admissible under the hearsay exception for then-existing state of mind).

Further, to the extent that Williams argues that admission of Trotter's statements would violate his confrontation rights, we disagree. In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court held that "the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." Howard v. State, 853 N.E.2d 461, 465 (Ind. 2006). While the Court in Crawford declined to "spell out a comprehensive definition of 'testimonial,'" it did offer clarifying examples of testimonial hearsay. Danford, 435 F.3d at 687 (citing Crawford, 541 U.S. at 68, 124 S. Ct. 1354). Testimonial hearsay includes prior testimony from a preliminary hearing or testimony in response to police interrogations. Id. When nontestimonial hearsay is offered, however, the Court maintains that a judicial determination of reliability is sufficient. Id. (citing Crawford, 541 U.S. at 68, 124 S. Ct. 1354; Ohio v. Roberts, 448

U.S. 56, 100 S. Ct. 2531 (1980)). The Court further noted that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. (citing Crawford, 541 U.S. at 51, 124 S. Ct. 1354). In this case, the alleged statements of Trotter during his conversation with Moore upon returning to the vehicle was more akin to a casual remark than it is to testimony in the Crawford-sense. See Danford, 435 F.3d at 687 (noting that the conversation between the witness and the declarant was "more akin to a casual remark than it is to testimony in the Crawford-sense").[2]

The trial court erred to the extent that it granted Williams's motion to suppress Trotter's statements to Moore immediately following Trotter's meeting with Williams and discussed above.

b. Statements of Trotter to Edwards

The State next argues that certain alleged statements made by Trotter to Edwards are admissible. Specifically, the State argues that Edward's testimony that he heard Trotter "growl" at Williams was not hearsay because it "possesses no factual content at all," and that Edwards's testimony that he heard Trotter say "F--- them" was not hearsay because that statement "carries no factual implication" and that "[a]t most, it is an

[2] The State also argues on appeal that Trotter's statements are not inadmissible under Evidence Rule 404(b). Williams does not present arguments on appeal with respect to Rule 404(b) which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but that the evidence may be "admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." To the extent that the challenged proposed testimony of Moore indicates that Trotter was or may have been involved in a drug-related offense at the grocery store, the State does not seek to introduce Trotter's testimony to show either Trotter's or Williams's propensity to engage in crime or that either of their behavior was in conformity with a character trait.

interjection, an utterance." Appellant's Brief at 11. Williams agrees that the "growl" was "a simple sound" but "[t]he mere fact that he growled means nothing by itself, and any attempt to characterize its meaning would be an improper attempt to testify about Trotter's state of mind, or improper argument as to his state of mind and intent." Appellee's Brief at 5. Without citation to the record, Williams also argues that "Trotter's alleged statement 'f--- you,' . . . [i]n the proper context . . . is clearly a statement being offered to prove Trotter did not return the money, and that was Thompson and William's [sic] alleged motive for killing him."[3] Id. at 5-6.

Hearsay is an out of court statement, other than one made by the declarant while testifying at a trial or hearing, offered to prove the truth of the matter asserted. Brown v. State, 725 N.E.2d 823, 827 (Ind. 2000) (citing Ind. Evidence Rule 801(c)). A statement is hearsay only if it is offered to prove the truth of the matter asserted in the statement. Id. (citation omitted). In addition, this court has stated that "[w]hen [a] statement is not a direct assertion of the declarant's then existing state of mind but circumstantial evidence of it, it is being offered not to prove the truth of the matter asserted, but for some other purpose" and that "thus, the statement by definition is not hearsay." Simmons v. State, 746 N.E.2d 81, 89 (Ind. Ct. App. 2001) (citing Angleton v. State, 686 N.E.2d 803, 809 (Ind. 1997), reh'g denied; 13, ROBERT LOWELL MILLER, JR., INDIANA PRACTICE §803.103A at 613-614 (2d ed. 1995) (noting that when a declarant's statement is offered as circumstantial evidence of the victim's state of mind, it is offered for a purpose other

[3] In the November 20, 2009 Summary filed by the State and Williams, Williams stated "No objection" to the State's proposed testimony that Trotter stated "F--- them." See Appellant's Appendix at 85.

than to prove the truth of the matter asserted, and therefore, is not hearsay)), reh'g denied, trans. denied.

In addition to testimony regarding Trotter's "growl," the State seeks to introduce testimony from Edwards that he called Trotter to warn him that Williams and Thompson were on their way to Trotter's house, and that Trotter stated: "F--- them." Id. Neither of these alleged statements by Trotter was a "direct assertion" of Trotter's statement of mind, but "circumstantial evidence of it." See Simmons, 746 N.E.2d at 89. Accordingly, the alleged statements are not hearsay. See Brown, 725 N.E.2d at 827 (holding that the statement "let's go" was not used to prove the truth of the matter asserted and as such it was not hearsay).

Further, even if hearsay, the State may introduce the statements under the then-existing state of mind exception contained in Evidence Rule 803(3). "State of mind, as that term is defined, may include emotion, sensation, physical condition, intent, plan, motive, design, mental feeling, pain, and bodily health." Camm v. State, 908 N.E.2d 215, 226 (Ind. 2009), reh'g denied. The alleged statements of Trotter were made contemporaneous with Trotter's mental feelings or emotions. See Bacher v. State, 686 N.E.2d 791, 795-797 (Ind. 1997) (holding that, even if it was hearsay, testimony of witnesses that a murder victim had told them that her gun was missing and that she was afraid as a result was evidence of fear and was permitted under the state-of-mind exception to the hearsay rule under Evidence Rule 803(3)); cf. Spencer v. State, 703 N.E.2d 1053, 1057 (Ind. 1999) (noting that statements did not fit squarely into the then-existing mental state exception because most of the statements were made hours or days

after the incident and as such were not contemporaneous with the declarant's mental emotions). And Williams's confrontation rights under Crawford would not be violated because the statements were more akin to casual remarks than to testimony in the Crawford-sense. See Danford, 435 F.3d at 687.

The court erred to the extent it granted Williams's motion to suppress Trotter's alleged statements.

2. Statements of Thompson

The State next argues that alleged statements made by Thompson do not constitute inadmissible hearsay and that "[t]here was . . . ample evidence to form the necessary foundation that there was a conspiracy between Thompson and Williams to kill [Trotter]." Appellant's Brief at 12. In support, the State points to the facts that "[s]everal telephone calls passed between Thompson and [Williams] during the days leading up to the shooting;" that "[s]hortly before Trotter was shot and killed, [Edwards] saw [Williams] and Thompson drive slowly by Trotter's residence;" that Thompson told Williams "go get that" and Edwards saw Williams get an AK-47 assault rifle; and that "Edwards then saw the two men enter Thompson's vehicle and . . . drive toward Trotter's residence." Id. at 12-13. Williams argues that all of the evidence of a conspiracy in this case comes from "one piece of evidence, Edwards [sic] statement," and that "[t]he State has not shown independent evidence outside that statement to establish the conspiracy Edwards claims occurred." Appellee's Brief at 6.

A statement is not hearsay if it is one "by a co-conspirator of a party during the course and in furtherance of the conspiracy." Roush v. State, 875 N.E.2d 801, 808 (Ind.

Ct. App. 2007) (citing Ind. Evidence Rule 801(d)(2)(E)). For a statement to be admissible under Rule 801(d)(2)(E), the State must prove that there is "independent evidence" of the conspiracy. Id. (citing Lott v. State, 690 N.E.2d 204, 209 (Ind. 1997)). "This means that the State must show, by a preponderance of the evidence, (1) the existence of a conspiracy between the declarant and the party against whom the statement is offered, and (2) that the statement was made in the course and in furtherance of the conspiracy." Id. (citing Barber v. State, 715 N.E.2d 848, 852 (Ind. 1999)). A statement is made in the course of a conspiracy when it is "made between the beginning and ending of the conspiracy." Id. at 809 (citation omitted). "And a statement is in furtherance of a conspiracy when the statement is designed to promote or facilitate achievement of the goals of the ongoing conspiracy." Id. (citations and internal quotation marks omitted). The existence of the conspiracy may be shown by direct or circumstantial evidence, and the evidence need not be strong. Wright v. State, 690 N.E.2d 1098, 1105 (Ind. 1997), reh'g denied.

The trial court noted that Edwards met with Thompson and Williams on the day of the shooting, that Thompson told Williams to "go get that," and Williams retrieved a rifle. Appellant's Appendix at 102. The court found that the conspiracy between Thompson and Williams to kill Trotter was "proven to the extent necessary to permit the admission of Thompson's statements from that point on."[4] Id. at 102.

[4] Some of the alleged statements which the court did not suppress appear to include: "Go get that;" "Keep your mouth closed;" "Trotter didn't go out like no ho, he had two guns and he was busting back;" and "Thinks Trotter got hit one time." Appellant's Appendix at 79-81. In addition, the court ruled that "Thompson's command does not qualify as hearsay" and was thus admissible. Id. at 102.

The State seeks to introduce testimony of Edwards regarding alleged statements of Thompson prior to the meeting at Williams's house. According to the State, Edwards would testify that he was with Trotter at Trotter's house shortly before the shooting and that Thompson called him as Thompson and Williams drove by Trotter's house and asked Edwards to keep Trotter on the porch. Specifically, Edwards would testify that Thompson said, "Look, keep him outside . . . Come around the corner;" "Stay outside with him;" and "Keep them on the porch. Stay there. I'll be right back." Id. at 79-80. Edwards told Thompson he would not "keep anyone on the porch," and Thompson told Edwards "Well, come over, I need to talk to you." Id. at 79.

We agree with the State that the independent evidence demonstrates by a preponderance of the evidence that a conspiracy between Thompson and Williams existed at the time that Edwards observed Thompson and Williams drive by Trotter's house and at the time that Thompson called Edwards to ask him to keep Trotter outside. The record reveals that the State planned to present evidence that Edwards was aware of rumors that Thompson had a "hit out" on Trotter, that Edwards had contacted Thompson "to find out what was going on," and that Thompson and Williams confirmed "that money was taken from [Williams] and the two of them [Thompson and Williams] want[ed] the money back." Id. at 49-50. The State also planned to present evidence that Edwards went to Trotter's house to try to convince him to give the money back to Thompson and Williams "or something bad is going to happen to him" and that Trotter "refuse[d] to give the money back . . . ." Id. at 50. Later, Edwards was at Trotter's house and, at the time Thompson and Williams drove by the house, received a call from

Thompson asking him to keep Trotter outside. The inference here is that Thompson and Williams desired to harm Trotter and that was the reason Thompson attempted to persuade Edwards to "keep [Trotter] outside." See id. at 79-80. Accordingly, the alleged statements made by Thompson to Edwards on the phone at that time are admissible as statements of a co-conspirator under Evidence Rule 801(d)(2)(E). See Wright, 690 N.E.2d at 1106 (holding that the declarant's statements were made in furtherance of a conspiracy and were thus admissible under Ind. Evidence Rule 801(d)(2)(E)); Roush, 875 N.E.2d at 808-809 (holding that independent evidence demonstrated that the declarant and defendant were engaged in a conspiracy and that certain statements were made in the course and in furtherance of the conspiracy).

The court erred to the extent it granted Williams's motion to suppress the alleged statements of Thompson to Edwards.

B. Protective Sweep

The State next argues that the assault rifle recovered in the search following Williams's arrest should be admissible. Specifically, the State argues that the "[p]olice discovered the assault rife [sic] inside [Williams's] residence during a legitimate protective swee[p]." Appellant's Brief at 13. The State argues that the sweep "occurred immediately after [Williams's] arrest and after officers entered the residence to see [] a crying child and to assure themselves that there was nobody inside who could cause violence," and that "the trained officers observed evidence of suspected ongoing drug activity during their surveillance immediately prior to [Williams's] arrest." Id. at 14, 15. The State argues that "police here had additional information that the house where

[Williams] was found had weapons and several other people inside." Id. The State further argues that "[t]he police did nothing more than quickly look in rooms to assure no person was hiding from them" and that "[t]he discovery of the assault rifle occurred when Detective Condon attempted to open a door and felt resistance behind it" and that "[t]he officer did not touch the gun until a warrant was obtained." Id.

Williams argues that police ordered him "to put down the infant he was holding before exiting the house" and that "[i]f this created a dangerous situation for the infant that is due entirely to the police who are not allowed to create their own emergencies to support unwarranted searches." Appellee's Brief at 7. Williams argues that "Detective Condon is either trying, after the fact, to characterize the fact in a way that excuses his unlawful behavior, when the facts as they were at the time would not do so" or "the Detective is so poorly trained in what constitutes protection and safeguarding of the public that he is behaving in a manner that is so dangerous and reckless that it should not be tolerated." Id. at 8.

As previously mentioned, the court found that it was proper for the police to order Williams to leave his child inside the house and for police to then check after the child's wellbeing. However, the court also found that there was no basis to justify the protective sweep of the house and granted Williams's motion to suppress the rifle.

As a general rule, a search warrant is required in order to conduct a lawful search. Johnson v. State, 766 N.E.2d 426, 432 (Ind. Ct. App. 2002), trans. denied. Because warrantless searches are *per se* unreasonable, the State bears the burden of establishing

that a warrantless search falls within one of the well-delineated exceptions to the warrant requirement. Id.

The United States Supreme Court defined a protective sweep as "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Maryland v. Buie, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094 (1990). As an incident to arrest officers may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Id. at 334, 110 S. Ct. at 1098. A search beyond those parameters is permissible only when there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. This court has also stated that "a protective sweep incident to an arrest occurring outside [a] residence may be valid if the police have articulable facts which support a reasonable belief that other persons may be inside the residence which may pose safety threats." Reed v. State, 582 N.E.2d 826, 828 (Ind. Ct. App. 1991), reh'g denied, trans. denied, cert. denied, 506 U.S. 848, 113 S. Ct. 142 (1992).

Detective Condon testified at the October 22, 2009 suppression hearing regarding the arrest of Williams and the protective sweep. Detective Condon testified that he and other officers were assigned to locate and take Williams into custody pursuant to an arrest warrant for murder. Detective Condon testified that police conducted surveillance of a

house where they believed Williams could have been, and the officers noticed "a lot of foot traffic" and "a lot of vehicular traffic" to the house and that visitors would "stay for a few minutes at a time and leave." Transcript at 36.

At some point, an individual driving a black Mercedes visited the house and after the person left the police stopped the vehicle. The driver stated that she visited Williams and that "she observed weapons in the house along with she believed [sic] several other people." Id. at 38.

Police surrounded the house and a detective approached the open front door and observed Williams in the living room holding a child. The detective ordered Williams out of the house, and Williams left the child in the house, exited the house, and was arrested. Police asked Williams if anybody else was inside the house, and Williams indicated that his child was inside.

Police then entered the house and located the child. Detective Condon testified that he noticed that "[t]here was a pistol that was sitting on top of another sofa . . . in the living room." Id. at 42. Detective Condon then went into the kitchen to see if anybody else was inside the house. He testified: "I know that there was another possible . . . suspect that we were looking for and I did not know if he was also inside this house." Id. at 43. When asked why he thought his safety was threatened, Detective Condon testified: "Because we already observed one gun in plain view. The female that was stopped said that she observed weapons inside the house. And the person that we apprehended was wanted in fact for murder." Id. at 44.

Detective Condon then attempted to open a door in a bedroom in the southwest part of the house to see if anyone was inside. He testified that "[t]here was some resistance as [he] was opening the door" and that he "could not open [the door] all the way." Id. at 44-45. He observed a rifle behind and leaning against the door. Other officers "swept the other bedroom and the basement . . . ." Id. at 47. Detective Condon testified that after conducting the sweep, police stayed in the living room with the child and waited for Child Protective Services and for a warrant to search the house. After a warrant was issued, the "crime lab" came to the house and recovered all of the evidence including the weapons. See id. at 49.

On cross-examination, when asked if police looked in the windows as they approached the house, Detective Condon testified that it was the common practice to do so. When asked whether police "report[ed] any movement of any type inside the house during that approach," Detective Condon testified "[n]o" and "[j]ust the noise of the child." Id. at 55. Detective Condon also testified that, after ordering Williams to exit the house, police "yelled for more people to come outside, but nobody did." Id. at 56.

Based upon the evidence presented at the suppression hearing, including that police were aware that there may have been weapons and other persons in the house and that Williams was wanted for murder and there was another possible suspect, we conclude that the facts "would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene," see Reed, 582 N.E.2d at 828, and that the rifle was discovered during a valid protective sweep and was therefore admissible. See Taylor v. State, 929 N.E.2d 912, 919 (Ind. Ct.

App. 2010) (holding that a shotgun was in plain view during a valid protective sweep and was therefore admissible), trans. denied; VanWinkle v. State, 764 N.E.2d 258, 267 (Ind. Ct. App. 2002) (concluding that protective sweep and preservation of evidence were valid justifications for entry and search), trans. denied; Reed, 582 N.E.2d at 828-829 (holding that the police showed articulable facts to justify a protective sweep where the arrest occurred outside of the residence). The court erred to the extent it granted Williams's motion to suppress the rifle discovered during the valid protective sweep.

For the foregoing reasons, we reverse in part the court's grant of Williams's motions to suppress.

Reversed in part and remanded.

ROBB, C.J., concurs in result.

RILEY, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-1004-CR-412
	)	
MICHAEL A. WILLIAMS,	)	
	)	
Appellee-Defendant.	)	

RILEY, Judge, dissenting with separate opinion.

I respectfully dissent and would affirm the trial court in all of its rulings.