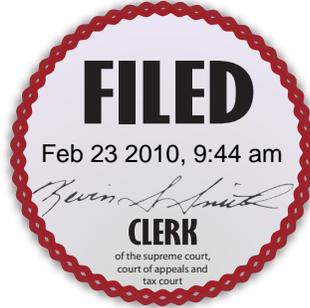


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JASON HARRIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0907-CR-630

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-0810-FB-244842

February 23, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jason Harris (“Harris”) was convicted in Marion Superior Court of Class B felony robbery. He appeals his conviction and raises two issues:

- I. Whether the trial court abused its discretion when it admitted recordings and transcripts of phone calls between Harris and his girlfriend; and,
- II. Whether the evidence is sufficient to support his conviction.

Concluding that the phone calls were properly admitted and that Harris’s Class B felony robbery conviction is supported by sufficient evidence, we affirm.

Facts and Procedural History

On September 21, 2008, a man, later identified as Harris, approached Marcus Malone (“Malone”) and asked him if he was selling a car. Malone told Harris that the car was already sold, and Harris left. Shortly thereafter, Harris returned. Armed with a handgun, Harris demanded all of Malone’s money. He then hit Malone on the head with the handgun, which caused injury and bleeding to Malone’s face. Harris attempted to force Malone into Malone’s house, but Malone was able to get away and run next door to the neighbor’s home where he called the police. During the commission of the robbery, Harris took Malone’s wallet, cellphone, and prescription glasses.

Malone recognized Harris because he had seen Harris in his neighborhood two or three times before the commission of the robbery. Malone told the police that Harris was wearing a white t-shirt, black pants and brown boots, that he was approximately five feet, eight inches tall, and weighed approximately 165 pounds. Tr. p. 13. Approximately two weeks after the incident, Malone identified Harris from a photo array.

Harris was subsequently charged with Class B felony robbery, Class B felony attempted criminal confinement, and Class C felony battery. Harris waived his right to a jury trial, and a bench trial was held on May 28, 2009. During that trial, the court admitted into evidence, over Harris's objection, jail recorded telephone conversations between Harris and his girlfriend. Harris was found guilty as charged and was sentenced to ten years for the Class B felony robbery conviction, with four years suspended.¹ Harris now appeals his conviction. Additional facts will be provided as necessary.

I. The Telephone Calls

First, we address Harris's claim that the trial court abused its discretion when it admitted into evidence the recorded telephone calls between Harris and his girlfriend while Harris was incarcerated. Harris argues that the State did not prove the identity of the caller and the admission of the telephone calls was "inconsistent with substantial justice." Appellant's Br. at 7-10.

"Indiana courts have long required that a caller's identity be established as a foundation for the admission of the content of a telephone call." State v. Motley, 860 N.E.2d 1264, 1266 (Ind. Ct. App. 2007) (citing Ashley v. State, 493 N.E.2d 768, 774 (Ind. 1986)). Yet, the identity of the caller need not be proven beyond a reasonable doubt. Id. "Any doubt regarding the credibility of the voice identification goes to the weight of the evidence, not its admissibility." Id. (quoting Ashley, 493 N.E.2d at 774). "Sufficient identification may be derived from testimony by a witness familiar with the caller's voice and who recognizes it in the conversation, as well as an inference that the

¹ The court concluded that the attempted criminal confinement and battery charges merged with the robbery conviction.

voice belongs to an individual based upon the circumstances and details included in the conversation.” Id.

In Motley, our court concluded that the State sufficiently established the caller’s identity because the officer testified that his prior conversations with the defendant enabled him to identify his voice in the recordings of the telephone conversations. The officer also testified that “the circumstances and details of the calls, such as remarks made to Motley’s name and nickname, led him to believe that he was listening to Motley’s voice.” Id.

Here, the State presented evidence that Harris was located in the cell blocks from which the phone calls were placed. Tr. pp. 56-57, 62-63, Ex. Vol., State’s Exs. 14 & 15. Detective Brian Shemenaur of the Indianapolis Metropolitan Police Department testified that he believed that the phone number belonged to Harris’s girlfriend, and he recognized the girlfriend’s voice because the detective met with her in person during the robbery investigation. Tr. pp. 41-42. In addition, the male caller was referred to as “Jason,” the details of the charged crime were discussed, and the victim, Malone, was mentioned several times throughout the calls. Ex. Vol., State’s Exs. 8 through 13. We therefore conclude that the State sufficiently established that Harris was the caller.

Harris also argues that the admission of the jail recorded telephone calls was “inconsistent with substantial justice.” Evidence Rule 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” Harris

contends that the telephone calls were admitted in violation of Rule 403 because the calls were confusing, had “inaudible spots,” and the conversations were “emotionally charged,” which was distracting. Appellant’s Br. at 10.

In addressing Harris’s arguments, we observe that although segments of the telephone conversations are difficult to decipher, the subject matter of the calls is easily understood. Harris wanted his girlfriend and/or other family members or friends to intimidate and/or bribe Malone to prevent him from testifying against Harris. “There is a long-standing line of cases holding that ‘threats against potential witnesses as attempts to conceal or suppress evidence are admissible as bearing upon knowledge of guilt.’” Bassett v. State, 895 N.E.2d 1201, 1211 (Ind. 2008) (quoting West v. State, 755 N.E.2d 173, 182 (Ind. 2001)). For these reasons, we conclude that Harris has not established that admission of the jail recorded telephone calls was “inconsistent with substantial justice.” The trial court acted within its discretion when it admitted the calls into evidence.²

II. Sufficient Evidence

Harris next argues that the evidence was insufficient to support his Class B felony robbery conviction. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is

² Harris also argues that admission of the phone calls was not proper under Evidence Rule 902(9). However, Harris’s argument is not supported by cogent reasoning, and therefore, the argument is waived. See Ind. Appellate Rule 46(A)(8)(a) (2010); Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006).

substantial evidence of probative value to support the conviction, it will not be set aside.
Id.

Harris argues that his conviction is not supported by sufficient evidence because Malone's testimony is incredibly dubious. The "incredible dubiousity rule" provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity." Murray v. State, 761 N.E.2d 406, 408 (Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. James v. State, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), trans. denied. "[A]pplication 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.'" Stephenson v. State, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

Harris argues that Malone's testimony is incredibly dubious because 1) Malone's description of Harris to the police during the investigation and his description at trial was inconsistent, 2) his testimony concerning the length of time between Harris's first and second approach was inconsistent, 3) and Malone testified to facts at trial that he failed to relay to the investigating police officer. Although Malone's trial testimony is inconsistent in some minor respects with his pre-trial statement, it was not equivocal, and Malone did not contradict himself on the witness stand. "The fact that a witness gives trial testimony that contradicts earlier pre-trial statements does not necessarily render the

trial testimony incredibly dubious.” Murray v. State, 761 N.E.2d 406, 409 (Ind. 2002) (citing Davenport v. State, 689 N.E.2d 1226, 1230 (Ind. 1997)).

Furthermore, there is circumstantial evidence supporting Harris’s robbery conviction. From the recorded telephone conversations between Harris and his girlfriend, the fact-finder could reasonably conclude that Harris wanted his girlfriend and/or other family members to intimidate or bribe Malone, which may be viewed as an admission of guilt. See e.g. Matthews v. State, 866 N.E.2d 821, 825 (Ind. Ct. App. 2007), trans. denied (stating that the defendant’s threats to a prosecution witness “are viewed as admissions of guilt and therefore are relevant to demonstrate an accused’s guilty knowledge”).

For all of these reasons, we conclude that sufficient evidence supports Harris’s robbery conviction. The State proved that Harris threatened Malone, struck him on the head with a handgun, and took Malone’s property. Accordingly, we affirm Harris’s Class B felony robbery conviction.

Conclusion

The trial court did not abuse its discretion when it admitted the jail recorded telephone conversations between Harris and his girlfriend, and the evidence is sufficient to support Harris’s Class B felony robbery conviction.

Affirmed.

BARNES, J., and BROWN, J., concur.