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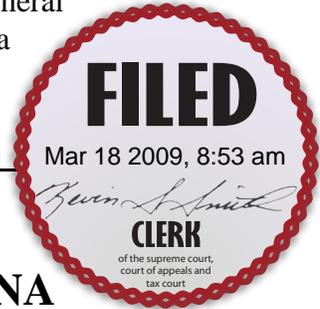
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**IN THE
COURT OF APPEALS OF INDIANA**

DEJUAN SAMPSON,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-0809-CR-537

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-0708-MR-177539

March 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Dejuan Sampson appeals his convictions for felony murder and class C felony battery.

We affirm.

Issues

Sampson presents two issues, which we restate as follows:

- I. Whether the trial court committed reversible error in admitting a bank withdrawal slip; and
- II. Whether the evidence is sufficient to support his convictions.

Facts and Procedural History

On the evening of August 24, 2007, Joseph Price and his friend, Jason Noyd, were driving around and smoking marijuana. Price had also smoked marijuana earlier that day. Noyd received a phone call, after which they drove to his home and retrieved a bag of marijuana.

They drove to an Indianapolis Shell gas station. Noyd entered the station and returned to the car with Sampson. Noyd got into the driver's seat, and Sampson got into the seat behind Noyd. A red Chevy Tahoe was parked nearby. Noyd gave Sampson a bag of marijuana. A second man wearing an orange shirt walked up to the passenger's side of Noyd's car. It was locked, so the man walked to the driver's side of the car. Sampson unlocked the door on the passenger's side, so the man walked back around the car and got in behind Price.

Sampson and the other man pulled out guns and put Noyd and Price in a headlock. Sampson, who was holding a gun to Noyd, demanded that Noyd and Price give them

everything they had. Noyd and Price complied. Sampson hit Price over the head with his gun, resulting in an open wound. As Sampson and his accomplice were exiting the vehicle, Noyd gunned the car's engine and attempted to flee. Price heard a gunshot, looked behind him, and saw Sampson pointing a gun at the car.

Noyd had been shot in the back. Noyd drove a short distance but collapsed from the gunshot wound and died shortly thereafter. An autopsy later showed that the wound was inflicted from a distance of between four inches and two feet.

The police obtained a surveillance video from the Shell station, which showed Sampson meeting Noyd inside the station and exiting the station with him. The police obtained Noyd's wallet, which contained a bank withdrawal slip for \$500. Police also discovered that fingerprints on the outside of the driver's side of Noyd's car belonged to Milton Kenney, who was a close friend of Sampson's. The police learned that Sampson's girlfriend, Valicia Spells, owned a red Tahoe that Sampson used on August 24, 2007, and did not return until 11:00 or 12:00 that night.

A few days after the shooting, police stopped a car in which Sampson and Spells were riding and found marijuana and \$500 in Spells's purse.

On August 30, 2007, the State charged Sampson with Count I, murder; Count II, felony murder; Count III, class A felony robbery; Count IV, class C felony battery; and Count V, class B felony unlawful possession of a firearm by a serious violent felon. The State later added a habitual offender charge.

A jury trial was held July 14-16, 2008. The jury found Sampson not guilty on Count I but guilty on Counts II, III, and IV. The State dismissed Count V, and Sampson pled guilty to the habitual offender charge. The trial court merged Count III with Count II and entered judgment of conviction on Counts II and IV. Sampson appeals.

Discussion and Decision

I. Admission of Evidence

Trial began Monday, July 14, 2008. On the previous Friday, the State informed Sampson that it had discovered that Noyd's wallet contained a withdrawal slip in the amount of \$500, the same amount of cash that was found in Spells's purse. When the State offered the wallet into evidence at trial, Sampson did not object.¹ Tr. at 315-16. On the last day of trial, as the State examined the lead detective regarding the bank withdrawal slip in Noyd's wallet, Sampson objected to its admission, asserting that "it wasn't discovered timely" and was therefore inadmissible. *Id.* at 475-76. The trial court overruled his objection, stating that the wallet had been in the property room since August of 2007 and therefore the defense had ample time to inspect the wallet. *Id.* at 476. Sampson did not request a continuance.

Sampson argues that the trial committed reversible error in admitting the bank withdrawal slip. The State contends that Sampson waived this argument. We agree with the State. Generally, where there has been a failure to comply with discovery procedures, a continuance is usually the proper remedy. *Fleming v. State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2003). Failure to request a continuance, where a continuance may be an appropriate remedy,

¹ The State did not disclose the wallet's contents at that time.

constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order. *Id.* Exclusion of evidence may be appropriate where the discovery non-compliance has been flagrant and deliberate, or so misleading or in such bad faith, as to impair the right of fair trial. *Dye v. State*, 717 N.E.2d 5, 10-11 (Ind. 1999).

Here, Sampson learned of the existence of the withdrawal slip on Friday. At the start of trial on Monday, he could have asked for a continuance but did not. When he did object to the bank withdrawal slip, he did not request a continuance. Sampson acknowledges that the State's late disclosure of the withdrawal slip was not flagrant, deliberate, misleading or in bad faith. Accordingly, Sampson's failure to request a continuance results in waiver of this issue.

Waiver notwithstanding, Sampson's claim is unavailing. Here, Sampson had access to Noyd's wallet and its contents for nearly a year and failed to inspect it. Accordingly, we conclude that the State did not violate discovery and that the trial court did not err in admitting the bank withdrawal slip. *See Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000) (holding that where State notified defendant of existence of photographs and defendant could have reviewed them in advance of trial, State's failure to furnish defendant with photographs was not a violation of discovery rules); *Conner v. State*, 711 N.E.2d 1238, 1246 (Ind. 1999) (“[T]he State will not be found to have suppressed material information if that information was available to a defendant through the exercise of reasonable diligence.”).

II. Sufficiency of the Evidence

Sampson challenges the sufficiency of the evidence supporting his convictions. Our standard of review is well established.

In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Brasher v. State, 746 N.E.2d 71, 72 (Ind. 2001) (citations omitted). “It is well established that the testimony of a single eye witness is sufficient to sustain a conviction.” *Id.* Also, circumstantial evidence alone may be sufficient to support a conviction. *Taylor v. State*, 676 N.E.2d 1044, 1047 (Ind. 1997). “If a reasonable inference can be drawn from the circumstantial evidence, the verdict will not be disturbed.” *Id.*

Sampson concedes that the evidence establishes that he was at the Shell gas station when the shooting occurred. However, Sampson contends that the evidence showing that he actually committed the crimes consists solely of Price’s testimony, which, he contends, is incredibly dubious. This Court “will not impinge on the jury’s responsibility to assess credibility and weigh evidence, unless [we are] confronted with inherently improbable testimony, or equivocal, wholly uncorroborated testimony of incredible [dubiosity].” *Warren v. State*, 701 N.E.2d 902, 906 (Ind. Ct. App. 1998), *trans. denied* (1999). “The doctrine of ‘incredible dubiousity’ applies when there is a complete lack of circumstantial evidence of the defendant’s guilt and when a sole witness presents inherently improbable testimony that is inherently contradictory and either equivocal or the result of coercion.” *Hubbard v. State*, 719 N.E.2d 1219, 1220 (Ind. 1999).

Specifically, Sampson argues that Price’s testimony is inconsistent in some respects with his earlier sworn and unsworn statements. However, we observe that “[t]he incredible dubiousity 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). Moreover, there was circumstantial evidence that supports Sampson’s convictions: Sampson’s girlfriend, Spells, owned a red Tahoe ; a red Tahoe was present at the Shell gas station; Spells’s purse contained \$500 and marijuana; and the finger prints of Kenney, Sampson’s close friend and accomplice, were found on Noyd’s car. Accordingly, we conclude that the incredible dubiousity rule is inapplicable and affirm Sampson’s convictions.

Affirmed.

MATHIAS, J., and RILEY, J., concur.