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IN THE
COURT OF APPEALS OF INDIANA

ROSHENE HINKLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A05-0811-CR-641
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0707-FA-146

April 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Roshene Hinkle appeals his convictions for Class B felony armed robbery, Class B felony criminal confinement, Class B felony carjacking, two counts of Class B felony burglary, and Class D felony theft. We affirm.

Issues

Hinkle raises two issues, which we restate as:

I. whether sufficient evidence supports his convictions; and

II. whether the trial court's failure to sua sponte give a limiting instruction regarding consideration of witnesses' police interviews was fundamental error.

Facts

The evidence most favorable to the convictions indicates that Hinkle and a group of friends engaged in a day long spree of criminal conduct that began in the early morning hours of June 27, 2007. Charles Miller drove Dexter Jones, J.E., L.H., Quentez Motley, and Hinkle from Indianapolis to Marion in Miller's mother's blue Chrysler Pacifica.[1]

Miller parked the Pacifica on Hayes Street and walked to Brad Robinson's home. As he left for work, Robinson noticed the Pacifica slowly driving down his street, and identified Jones as a passenger in the rear seat of the vehicle. After Robinson left, Jones kicked down the door and the group ransacked the home while Hinkle acted as a lookout.

[1] J.E. and L.H. are juveniles.

As they were leaving the residence, a neighbor noticed and yelled at them, and his wife called police. Police responded and found the Robinson residence ransacked. The items taken included a television, laptop computer, software and components for a deejay business, a bag with personal papers, and a pair of athletic shoes.

Meanwhile, the group drove the Pacifica around Marion looking for another car. They stopped near Amie Turney's home, where a black Hyundai Santa Fe was parked in the driveway. Jones entered the home through an open side door and pointed a gun at Turney. Turney was in the kitchen, with her baby, preparing a bottle. Jones demanded money and her car keys, while the rest of the group looked around the house for items to steal. Jones kept the gun pointed at Turney, while she held her ten month old daughter. Jones forced Turney into one of the bedrooms and demanded she tell him where they could find money and jewelry. Turney thinks five or six young men entered her home, but she could only identify Jones and Motley. The group left her home and told her not to move. They took her phone, the Hyundai, jewelry, and other items.

The group then split up and drove both vehicles back to Indianapolis. They used Turney's credit card to buy gasoline. Miller dropped off the Pacifica at his mother's place of work, then they drove the Hyundai to a hotel. The group went swimming at the hotel pool, apparently drawing the attention of hotel security. Security personnel noticed that the temporary paper license plate taped upside down in the rear window of the Hyundai belonged to a Cadillac. Hotel security alerted the Indianapolis Metro Police Department ("IMPD"), who came to the scene and determined the Hyundai had been reported stolen.

IMPD officers apprehended J.E., L.H., Motley, and Hinkle as they left the hotel. Miller fled the scene. Items stolen from Robinson's and Turney's homes were recovered in the Hyundai. A note addressed to "Roshene" and a .25 caliber handgun with a laser sight was also recovered from the Hyundai. Hinkle's fingerprints were found on the temporary license plate and the side doors.

The State charged Hinkle with two counts of Class B felony burglary, Class B felony armed robbery, Class B felony criminal confinement, Class B felony carjacking, and Class D felony theft. A jury found Hinkle guilty of all charges on June 4, 2008. The trial court sentenced Hinkle to eighteen years, with five suspended to probation. This belated appeal followed.

Analysis

I . Sufficiency of the Evidence

When reviewing 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 ours, 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 have found the elements of the crime proven beyond a reasonable doubt. Id.

Hinkle contends the testimony of J.E., who implicated Hinkle, is incredibly dubious and should be disregarded. "A court will impinge upon 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 dubiosity." Murray v. State, 761 N.E.2d 406, 408 (Ind. 2002). Application of the rule is rare and a conviction will be overturned only if a witness's testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007). "The fact that a witness gives trial testimony that contradicts earlier pre-trial statements does not necessarily render the trial testimony incredibly dubious." Murray, 761 N.E.2d at 409.

J.E.'s testimony is inconsistent, but does not rise to the level of incredible dubiosity. The State called J.E. as a witness and he initially testified that he, L.H., Miller, Jones, and Motley picked up Hinkle early in the morning on the way to Marion. J.E. said Hinkle acted as a lookout while the group burglarized the first home and brandished a gun in the second home. On cross-examination, however, J.E. began to backpedal and indicated that Hinkle was not in Marion. J.E. said he only told the police what they wanted to hear.

Yet during re-direct examination, J.E. indicated Hinkle did come with the group to Marion, but changed his story regarding Hinkle's role in the crimes there. When asked if Hinkle participated in the Marion crimes, J.E. responded "not all of 'em, just some of 'em." Tr. p. 353. He testified that Hinkle was only the lookout during the burglary of Robinson's house and Hinkle began to participate in the burglary of the Turney house, but walked away before the group was finished with the crime. J.E. explained that he

answered defense counsel's questions differently because he "was nervous and just ready to go home." Id. 359. On re-cross, J.E. admits that he has told four different stories, and that he is probably not reliable. Then on a second re-direct, J.E. affirmed that Hinkle was in Marion when the group broke into the two homes. After J.E.'s testimony, the State called Detective Ben Caudell who presented the audio recording and transcript of J.E.'s interview. Detective Caudell testified that J.E. was not pressured and his mother was present during the interview.

J.E.'s flip-flopping goes to his overall credibility, but in no way makes his testimony incredibly dubious. The jury was free to assess his credibility and determine which of his answers and stories were believable. "It is well established that the testimony of a single eye witness is sufficient to sustain a conviction." Brasher v. State, 746 N.E.2d 71, 72 (Ind. 2001). The jury was in the best position to assess J.E.'s answers and observe his demeanor in responding differently to the prosecutor and defense counsel. J.E.'s testimony of Hinkle's participation in the crimes is sufficient to support Hinkle's convictions.

Moreover, J.E.'s testimony was not wholly uncorroborated, so application of the incredible dubiosity rule is unwarranted. See Murray, 761 N.E.2d at 408 (explaining that application of the rule is limited to inherently contradictory testimony when there is a complete lack of circumstantial evidence of defendant's guilt). Here, circumstantial evidence included Hinkle's fingerprints on the temporary license plate and door of the stolen Hyundai and his personal items in the vehicle. Hinkle maintains that he did not join the group and get into the vehicle until they returned to Indianapolis to go

swimming. It was within the jury's province to disbelieve Hinkle's testimony. The jury heard two of Hinkle's accomplices deny Hinkle's involvement on the witness stand, but it watched as the accomplices were presented with and denied earlier contrary statements they each had made to investigators. The jury was also presented with evidence that Hinkle's stipulated polygraph examination result indicated deception. Sufficient evidence existed for the jury to conclude that Hinkle accompanied the group to Marion and participated in the June 27, 2007 crime spree.

II. Limiting Instruction

Following the testimony of J.E., L.H., Kevin Ingram, and Motley,[2] the prosecutor introduced prior statements each had given to police. Hinkle did not object to the introduction of the transcripts or audio recordings.[3] On appeal, Hinkle contends the trial court erred by not giving an instruction limiting the jury's consideration of the statements only for credibility determinations and not as substantive evidence of guilt.

When the State called L.H. he initially told the prosecutor that he "forgot everything."[4] Tr. p. 366. L.H. then said that Hinkle was not with the group when they committed the crimes in Marion. He told the prosecutor he only named Hinkle in his statement because the police threatened him. L.H. was unclear, however, on the details

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[2] The State also referenced Jones's prior statement during his testimony, but it does not appear those transcripts were admitted. Hinkle does not contest the questioning of Jones on appeal.

[3] Defense counsel did object to a portion of the audio recording of Ingram's interview on grounds that it may include evidence of other crimes, but that portion of the interview was redacted and the objection was overruled.

[4] When the prosecutor eventually did start quoting the transcript of L.H.'s statement to police, she did not appear to do so in order to refresh his recollection.

of how or when the police threatened him and whether his parents or guardian were present. Then L.H. told the prosecutor he lied to detectives and he lied on the stand during his own juvenile adjudication. Detective Brian Sharp testified that L.H. was not threatened in any way and his mother was present during the interview. The audio recording was played and transcript admitted during Detective Sharp's testimony.[5]

When the State called Motley, he testified that only L.H., Jones, and Miller came with him to Marion on June 27, 2007. Yet on August 8, 2007, when Motley gave a statement to Detectives Sharp and Caudell he said L.H., J.E., Jones, Miller, and Hinkle came to Marion that day. Motley referenced Hinkle by name at least ten times in his statement. The prosecutor asked why Motley mentioned Hinkle so many times if he was not in Marion, and Motley explained that somebody already told the detectives Hinkle was there and he was just telling them what they wanted to hear. Motley claimed the detectives did not record the portion of the statement when he said Hinkle joined them only for swimming. He then testified on re-direct that J.E. was not in Marion with the group that day.[6] Detective Sharp testified that Motley was not threatened and his entire statement was recorded. The audio recording of Motley's interview was played for the jury and the transcript admitted into evidence during Detective Sharp's testimony.

Kevin Ingram was interviewed by police because Hinkle initially implicated Ingram in the Marion crimes. During interviews, Ingram told police Hinkle and Miller

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[5] L.H. also gave an earlier statement to police on July 30, 2007. The audio and transcript of this statement came in during Detective Larry Shaw's testimony.

[6] J.E. had already pled guilty to the offenses and testified admitting his involvement in a juvenile court proceeding.

came to his house and invited him to go to Marion with them that day, but he stayed in Indianapolis because he had to appear in court. At trial, however, Ingram denied knowing anything about Hinkle's involvement and claimed Hinkle did not come to his house before the crimes. Ingram said he lied in his statement to police and he only told the detective "what he wanted to hear." Tr. p. 384. During Detective Sharp's testimony, the audio recording of Ingram's interview was played and the transcript admitted into evidence.

The inconsistencies in J.E.'s testimony were outlined above. As discussed, the prosecutor read excerpts from J.E.'s police interview to address those inconsistencies. After J.E.'s testimony, the State also called Detective Caudell who presented the audio recording and transcript of J.E.'s statement. Defense counsel also took ample time to cross examine the detective involved in the interview, using the transcript and referencing the audio heard by the jury. Defense counsel questioned Detective Caudell's interview techniques. It appears both parties used the detectives' testimony and interview transcripts to present evidence regarding the condition of the interviews. Because L.H., J.E., Motley, and Ingram claimed they made statements under police pressure, it is likely the transcript and audio versions were admitted to prove these witnesses had not been pressured, though the prosecutor offered no explicit reason prior to admission. See Pruitt v. State, 622 N.E.2d 469, 473 (Ind. 1993) (noting that it was proper for the State to be able to present evidence that a witness was not actually subject to duress, despite her testimony to the contrary).

Hinkle relies on Appleton v. State, 740 N.E.2d 122, 126 (Ind. 2001), to argue that the admitted statements are unsworn prior inconsistent statements that should not have been admitted as substantive evidence without a limiting instruction. In Appleton, our supreme court held that once a witness has admitted making an inconsistent statement, further evidence is unnecessary for impeachment purposes. Appleton, 740 N.E.2d at 126. Appleton does not, however, create a mandatory duty for the trial court to sua sponte issue a limiting instruction.

Hinkle concedes on appeal that a failure to object to the admission constitutes waiver of that issue for appeal. Still, Hinkle contends the trial court should have sua sponte given a limiting instruction or an admonishment warning the jury not to consider the statements as substantive evidence. "[A] trial court has no affirmative duty to admonish a jury sua sponte as to such evidentiary matters." Small v. State, 736 N.E.2d 742, 746 (Ind. 2000). In Small, our supreme court explained that if a defendant believes there is a danger the jury will use a statement as substantive evidence, then it is "incumbent upon the defendant" to request the jury be admonished. Id.; see also Ind. Evidence Rule 105 (requiring trial court to restrict evidence to its proper scope and admonish jury accordingly upon request, but imposing no affirmative duty to do so). Because Hinkle failed to request a limiting instruction and made no other objection at the time the evidence was admitted, he has waived any claim of error based on the absence of an admonition or limiting instruction.

Hinkle maintains that the admission of these statements without a limiting instruction amounts to fundamental error and requires reversal. Fundamental error makes

a fair trial impossible or constitutes a clearly blatant violation of basic and elementary principles of due process so as to present an undeniable and substantial potential for harm. Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006). Hinkle cannot prove fundamental error because he cannot show the trial court had any duty to sua sponte issue a limiting instruction in the first place. As such, the trial court committed no error, let alone fundamental error.

Conclusion

Sufficient evidence existed for the jury to find Hinkle guilty of the charged offenses. The trial court's failure to sua sponte issue a limiting instruction regarding the admitted police interviews is not fundamental error. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.