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**IN THE
COURT OF APPEALS OF INDIANA**

ADRIAN C. WHITLOW, JR.,)

Appellant-Defendant,)

vs.)

No. 71A05-0812-CR-737

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0808-FB-112

May 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Adrian C. Whitlow, Jr. (“Whitlow”) was convicted after a jury trial of robbery¹ as a Class B felony. He appeals, raising the following restated issues:

- I. Whether the trial court erred in denying Whitlow’s motion for directed verdict because he contends that the State failed to prove that the BB gun used in the robbery was a deadly weapon; and
- II. Whether the other evidence presented was sufficient to support Whitlow’s conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of August 15, 2008, Patrick Moran spent several hours drinking with friends at the Parkview Tavern in South Bend, Indiana. Moran stayed until the bar closed and walked home around 3:30 a.m. On his way home, Moran stopped in front of an apartment building to give a woman a cigarette. While Moran was standing there, a man, later identified as Whitlow, appeared from between the two apartment buildings. Whitlow was holding a gun in his left hand and said either, “Hey dude” or “Hey white boy.” *Tr.* at 157. When Moran first saw Whitlow, he was about twenty feet from Moran, and the area was well-lit. As Whitlow walked toward Moran, he put the gun in his pocket and told Moran to “give [him] what [you got],” which Moran understood as meaning to give Whitlow money. *Id.* Moran only had twelve or fourteen dollars, which he gave to Whitlow. Whitlow then took the money and walked away.

¹ See Ind. Code § 35-42-5-1.

Moran then walked a short distance and called the police using his cell phone. He told the dispatch operator that he had been robbed and described the robber as a black man, under six feet tall, wearing a blue track suit, and possessing a black semi-automatic handgun. *Id.* at 163-64, 179. However, Moran was not able to describe Whitlow's facial features. While on the phone with the police, Moran stayed in the area, but walked west to the next intersection. Moran saw a police car driving toward him. As he walked in the direction of the police car, he noticed Whitlow walking south, approaching the police car. Moran was still on the phone with the dispatcher and told her that the robber was "right there next to [the police] car." *Id.* at 160.

Corporal Michael Tutino was the officer in the police car responding to the dispatch. After observing Whitlow, who matched the description given by dispatch, at the intersection, Corporal Tutino pulled over, exited his vehicle, and told Whitlow to stop. Whitlow turned around, and Corporal Tutino said, "Let me see your hands, come back over here to me, and talk to me real quick." *Id.* at 239. Whitlow then turned away and "started wrestling around in the front area of his jacket." *Id.* Corporal Tutino again told Whitlow to stop and show his hands, and Whitlow complied. When Corporal Tutino directed Whitlow to turn around and walk toward him, Whitlow was hesitant to let the officer see the front of his body. Because Whitlow's actions made the officer uncomfortable, he told Whitlow to stop walking and waited for Corporal Frank Beigelbeck to arrive before taking any further action.

Corporal Beigelbeck had been parked in the vicinity prior to Corporal Tutino's arrival and had heard the dispatch that the robber was in the area of Corporal Tutino's car. He saw

Corporal Tutino exit his vehicle and confront Whitlow. When Corporal Beigelbeck observed Whitlow fidgeting, he ran toward Corporal Tutino as he knew they were looking for an armed robbery subject and thought the officer could be in danger. When Corporal Beigelbeck reached Corporal Tutino, Whitlow had his hands up but kept reaching toward his waistband. After repeated commands from Corporal Beigelbeck to place his hands on his head, Whitlow finally complied. Corporal Tutino observed a bulge in Whitlow's jacket and told Corporal Beigelbeck that they should secure Whitlow. As Corporal Beigelbeck was about to perform a patdown search, Whitlow stated that he had a BB gun. Corporal Beigelbeck discovered the BB gun in the left side of Whitlow's waistband. Corporal Beigelbeck was unsure if it was a real firearm at first, but after inspecting it, he realized it was a BB gun. While being handcuffed, Whitlow spontaneously stated, "I didn't rob anybody." *Id.* at 210-11, 242. Neither police officer found any cash on Whitlow when he was arrested.

The State charged Whitlow with robbery as a Class B felony. A jury trial was held, and after the State presented its evidence, Whitlow made an oral motion for a directed verdict, arguing that the State had failed to prove that the BB gun was a deadly weapon because it was not shown that the BB gun was capable of inflicting serious bodily injury. The trial court denied Whitlow's motion finding that the issue was a question for the jury to determine. At the conclusion of the trial, Whitlow was found guilty as charged and sentenced to twenty years. Whitlow now appeals.

DISCUSSION AND DECISION

I. Directed Verdict

A trial court may grant a motion for a directed verdict only where there is a total lack of evidence regarding some essential issue, or where there is no conflict in the evidence and it is susceptible to only one inference, and that inference is in favor of the defendant. *State v. Taylor*, 863 N.E.2d 917, 919 (Ind. Ct. App. 2007); *Edwards v. State*, 862 N.E.2d 1254, 1262 (Ind. Ct. App. 2007), *trans. denied*. “Under no circumstances may a trial court considering a criminal defendant’s motion weigh the evidence or the credibility of the witnesses.” *State v. Casada*, 825 N.E.2d 936, 939 (Ind. Ct. App. 2005). The motion must be denied if there is evidence of each element of the crime charged, or if there are at least inconsistent possible inferences. *Id.*

“If the evidence is sufficient to sustain a conviction upon appeal, then a motion for a directed verdict is properly denied; thus our standard of review is essentially the same as that upon a challenge to the sufficiency of the evidence.” *Edwards*, 862 N.E.2d at 1262. We view the evidence in a light most favorable to the party against whom a directed verdict would be entered and do not reweigh the evidence or judge the credibility of the witnesses. *Taylor*, 863 N.E.2d at 919.

Whitlow argues that the trial court erred when it denied his motion for directed verdict because the State failed to prove that the BB gun used in the robbery could have inflicted serious bodily injury. More specifically, he contends that the evidence presented by the State was not sufficient to demonstrate that the BB gun was a deadly weapon because Whitlow

was twenty feet away when Moran first saw the gun, he put the gun in his pocket before approaching Moran, the gun was never pointed at Moran, and Moran never testified that he felt any fear. Whitlow further claims that Corporal Beigelbeck's testimony that he immediately recognized the weapon as a BB gun and that if it had been fired at him, he would not have felt it through his uniform establishes that insufficient evidence was introduced to show that the BB gun was a deadly weapon.

In order for the State to convict Whitlow of robbery as a Class B felony, it was required to prove that he knowingly or intentionally took property from another person or from the presence of another person by using or threatening the use of force and while armed with a deadly weapon. Ind. Code § 35-42-5-1. A "deadly weapon" is defined as "a loaded or unloaded firearm" or a "destructive device, weapon, device, taser, . . . or electronic stun weapon, . . . equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury." Ind. Code § 35-41-1-8(a). "Serious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss or impairment of the function of a bodily member or organ, or loss of a fetus." Ind. Code § 35-41-1-25.

Whether a weapon is a deadly weapon is determined from a description of the weapon, the manner of its use, and the circumstances of the case. *Davis v. State*, 835 N.E.2d 1102, 1111 (Ind. Ct. App. 2005), *trans. denied* (2006). "The fact finder may look to whether the weapon had the actual ability to inflict serious injury under the fact situation and whether

the defendant had the apparent ability to injure the victim seriously through use of the object during the crime.” *Merriweather v. State*, 778 N.E.2d 449, 457 (Ind. Ct. App. 2002). Although not firearms, BB guns and pellet guns have consistently been found to be deadly weapons by Indiana courts. *See Davis*, 835 N.E.2d at 1112-13 (concluding that BB guns were readily capable of causing serious bodily injury and were used in threatening manner causing victims to experience substantial fear); *Merriweather*, 778 N.E.2d at 458 (finding that BB guns used in robbery were deadly weapons because had apparent ability to cause serious bodily injury and were used in threatening manner, putting victims in fear); *Whitfield v. State*, 699 N.E.2d 666, 670 (Ind. Ct. App. 1998) (concluding that under specific facts of case, disabled pellet gun was deadly weapon because used in threatening manner and placed victim in fear), *trans. denied*.

Here, the evidence most favorable to the verdict showed that Whitlow emerged from between the apartment buildings, displayed the BB gun to Moran, and stated something like, “Hey dude” or “Hey white boy.” *Tr.* at 157. As he approached Moran, he placed the BB gun into his jacket pocket and told Moran to give him everything he had. *Id.* Moran proceeded to give Whitlow all of the cash that he had with him. Both Corporal Beigelbeck and Corporal Tutino testified that the BB gun was realistic looking and looked like an authentic handgun at first sight. Additionally, Corporal Beigelbeck testified that a BB gun is capable of causing “a lot of damage” if shot at the eye or mouth of someone. *Id.* at 217. Further, although Moran did not testify that he was afraid or felt fear, a jury could reasonably infer from the evidence presented that the use of the BB gun placed Moran in fear. *See Rickert v. State*, 876 N.E.2d

1139, 1142 (Ind. Ct. App. 2007) (concluding that jury could infer that victim handed over money because she was in fear when she was robbed at gunpoint and complied with defendant's requests to hand over money). Moran testified that he believed that the BB gun was a real firearm and that he did not move when he saw the gun and was compelled to give Whitlow all of his money. *Id.* at 157-58, 164, 191. Moran stated that he wanted to keep his distance from Whitlow and "didn't want to get any closer to him" even after Whitlow had been apprehended by the police officers. *Id.* at 163. Corporal Beigelbeck testified that Moran seemed upset and a little bit nervous when speaking to the officers after the robbery. *Id.* at 218.

We conclude that sufficient evidence was presented to establish that Whitlow used a deadly weapon in the commission of the robbery. Evidence was presented that a BB gun is capable of causing serious bodily injury, and under the circumstances of the present case, the evidence was sufficient for the jury to reasonably conclude that Whitlow used the BB gun in a threatening manner, inducing fear in Moran. The trial court did not err when it denied Whitlow's motion for directed verdict.

II. Sufficient Evidence

As previously stated, when reviewing a challenge to the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id.*; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction

if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523.

Whitlow argues that the State did not present sufficient evidence to support his robbery conviction. He contends that Moran was confused about most of the circumstances surrounding the incident, including when he left the bar, the route he took home, where the incident occurred, when he called the police, and where the police apprehended Whitlow. He also claims that Moran was mistaken regarding his identification of Whitlow as the robber because the clothes that he described the suspect as wearing did not match what Whitlow was wearing.

The evidence presented showed that Moran was able to state that he was robbed in front of an apartment building and where that building was located. His description of the robber matched Whitlow, and the testimony of Moran, Corporal Tutino, and Corporal Beigelbeck were all consistent in describing what Whitlow was wearing. *Tr.* at 156, 166, 178, 213, 241. While there were some inconsistencies in Moran's testimony and the alcohol that he consumed may have impacted his ability to observe and recollect, these are matters for the trier of fact to determine. Whitlow's arguments are merely an invitation to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *Williams*, 873 N.E.2d at 147. We therefore conclude that sufficient evidence was presented to support Whitlow's conviction. Affirmed.

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