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**IN THE
COURT OF APPEALS OF INDIANA**

RONALD FRANCES,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0605-CR-406
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles Wiles, Senior Judge
Cause No. 49G04-0408-MR-138844

May 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ronald Frances appeals his conviction for Murder,¹ a felony, arguing that the trial court erred by admitting certain portions of Frances's statements into evidence and that there is insufficient evidence supporting the conviction. He also appeals his sentence, contending that the trial court had no authority to impose enhanced, consecutive sentences. Finding no error, we affirm the judgment of the trial court.

FACTS

In early July 2004, Lena Garton and her mother, Diana Kyle, went to Florida. Garton and Frances had been in a tumultuous romantic relationship for approximately six months. During their trip, Kyle observed significant bruising on Garton's legs. Kyle returned to Indiana a few days later and Garton remained in Florida until July 19. After Kyle returned home, Frances telephoned her every day at all hours of the day and night, looking for Garton. The last time Kyle saw or heard from Garton was on July 21, 2004, at approximately 3:00 p.m. Garton did not return home that evening, causing Kyle to file a missing person's report the following day.

Jeffrey Cassaday picked Garton up at Kyle's home on July 21, 2004, and brought her to Frances's neighborhood. After spending some time with Cassaday, Garton walked down an alley towards Frances's residence. Cassaday expected to see Garton later that evening but she did not return and he did not see her again.

¹ Ind. Code § 35-42-1-1.

Kevin Brown observed Garton arguing with Frances on July 21, 2004. Later that evening, Brown saw Frances and asked about Garton's whereabouts; Frances replied that Kyle had picked up Garton, which was not true. Brown did not see Garton again.

On July 27, 2004, Elijah Milton was walking in Frances's neighborhood and observed Frances exit from a vehicle that was parked in an alley. Milton later testified that Frances "scared me, it was just like a shiver, you know, something wasn't right" Tr. p. 424. The vehicle from which Frances had exited had been parked in the neighborhood so that Brown could repair the brakes.

On July 29, 2004, an Indianapolis Police officer responded to a call that a foul odor was coming from an abandoned vehicle—the same vehicle from which Milton had observed Frances exit two days before. Upon opening the vehicle's trunk, the officer discovered Garton's badly decomposed remains. Later that night, Brown received a phone call from Frances, who wanted to know what was happening. Brown replied that there were many police officers near the vehicle and Frances immediately asked if the officers were around the trunk. Brown responded that they had found a body, and Frances informed Brown that it was Garton.

Frances could not be located during the investigation of Garton's murder, but on July 31, 2004, Indianapolis Police officers attempted to initiate a traffic stop with Frances because of an outstanding warrant unrelated to the murder investigation. Frances led twenty police officers on a thirty- to forty-minute high-speed chase. The police ultimately apprehended Frances and restrained and placed him in the back of the police vehicle of Deputy Mathew

Morgan of the Marion County Sheriff's Department. After Deputy Morgan entered the vehicle, Frances began to laugh and giggle. Deputy Morgan looked in the mirror and asked, "what's so funny?" Id. at 681-82. Frances responded, "I killed that bitch" Id. at 682.

Subsequently, Deputy Morgan transported Frances to the homicide and robbery office of the Indianapolis Police Department to be interviewed by Detective Thomas Tudor. Detective Tudor was concerned about Frances's apparent level of cocaine intoxication. The detective requested that a medical professional evaluate Frances; following the evaluation, the emergency medical technician concluded that Frances did not need treatment and was able to participate in an interview. Detective Tudor then advised Frances of his rights, after which Frances signed a waiver form and agreed to speak to the detective. Frances told Detective Tudor that he had been in the vehicle and the trunk of the vehicle. Frances then invoked his right to an attorney and stopped the interview before Detective Tudor recorded his statement.

On August 4, 2004, the State charged Frances with murder, class D felony resisting law enforcement, class D felony auto theft, class D felony possession of cocaine, class D felony criminal recklessness, and class A misdemeanor possession of paraphernalia. Frances filed a motion to suppress and a motion in limine regarding his statements to Deputy Morgan and Detective Tudor; the trial court denied both motions.

On March 20, 2006, Frances pleaded guilty to resisting law enforcement, auto theft, and criminal recklessness in exchange for the State's agreement to dismiss the possession of cocaine and possession of paraphernalia charges. The plea agreement provided that the

sentences would run concurrently. The remaining murder count was tried to a jury beginning on March 27, 2006, and the jury found Frances guilty as charged.

The trial court held a sentencing hearing on April 18, 2006. The trial court found Frances's criminal history and prior unsuccessful attempts at rehabilitation to be aggravating factors. As mitigating circumstances, the trial court found that Frances had a drug addiction and a child who needed financial support. Finding that the aggravators outweighed the mitigators, the trial court sentenced Frances to two years on each of the counts of resisting law enforcement, auto theft, and criminal recklessness, to be served concurrently pursuant to the plea agreement. It sentenced Frances to sixty-five years on the murder conviction, to be served consecutively to the other sentences, for an aggregate executed sentence of sixty-seven years. Frances now appeals.

DISCUSSION AND DECISION

I. Admission of Frances's Statements to Police

Frances first argues that the trial court erred in admitting into evidence the statements that he made to Deputy Morgan and Detective Tudor. As we consider this argument, we observe that a trial court has broad discretion in ruling on the admissibility of evidence. Washington v. State, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). We will reverse a trial court's ruling on the admissibility of evidence only when it constitutes an abuse of discretion, which occurs when the trial court makes a decision that is clearly against the logic and effect of the facts and circumstances before it. Id.

A. Statement to Deputy Morgan

As noted above, after being placed inside Deputy Morgan's vehicle following a high-speed chase, Frances began to laugh and giggle. Deputy Morgan looked in the mirror and asked, "what's so funny?" Tr. p. 681-82. Frances responded, "I killed that bitch" Id. at 682. Frances contends that this statement is inadmissible because he was in custody and had not been advised of his rights. The trial court, however, concluded that Deputy Morgan's query was a simple question rather than an interrogation. Id. at 98.

A suspect's Miranda² rights apply only to custodial interrogations. White v. State, 772 N.E.2d 408, 412 (Ind. 2002). Under Miranda, an "interrogation" includes questions, words, or actions that the officer knows or should know are reasonably likely to elicit an incriminating response. Id. Thus, not every question a police officer asks of a person in custody amounts to an "interrogation" for Miranda purposes. Murrell v. State, 747 N.E.2d 567, 573 (Ind. Ct. App. 2001).

As support for his argument, Frances directs our attention to Furnish v. State, in which a police officer asked a robbery suspect in custody, "where'd you get all the money?" 779 N.E.2d 576, 580 (Ind. Ct. App. 2002). We concluded that the officer's question amounted to a custodial interrogation, inasmuch as the officer knew that the defendant was in custody and should have known that his question would elicit an incriminating response. Id.

Furnish is readily distinguishable from the circumstances herein. In Furnish, the officer's inquiry was made in response to his observation of the defendant pulling bundles of

² Miranda v. Arizona, 384 U.S. 436 (1966).

money from his boots during a search for weapons. Id. at 579. Here, however, Deputy Morgan’s query was made after Frances engaged in a high speed chase and was pulled from his vehicle, restrained, and placed in a police vehicle, after which Frances began to laugh and appeared excited. At that time, Deputy Morgan had not personally searched him, nor had Frances been placed in handcuffs. Thus, Deputy Morgan had a legitimate interest in knowing why Frances was laughing. See id. at 580 (finding that exceptions to Miranda exist when officers are concerned that a weapon remains undiscovered).

Moreover, Deputy Morgan’s question was not reasonably likely to elicit an incriminating response from Frances—he merely asked what Frances found to be so funny. See White, 772 N.E.2d at 412 (finding no custodial interrogation when, after the defendant stated that he wanted to see whether the drug-sniffing dog would find where he put the drugs, an officer asked the defendant what he thought of the K-9’s work; the officer’s inquiry was not likely to elicit an incriminating response so the defendant’s reply that the police dog was impressive was admissible); Hopkins v. State, 582 N.E.2d 345, 348-49 (Ind. 1991) (finding no custodial interrogation where the defendant turned to the officer and said, “I think I did it,” and the officer responded, “What?” as a mere reflex to the defendant’s first statement).

We find that Frances’s statement to Deputy Morgan that “I killed the bitch” was a volunteered statement that did not implicate Miranda. See White, 772 N.E.2d at 412 (finding that volunteered statements do not implicate Miranda and are admissible in the absence of Miranda warnings because they do not involve custodial interrogation). The trial court did not abuse its discretion by admitting this statement into evidence.

B. Statements to Detective Tudor

Frances next argues that the “confession” he made to Detective Tudor was involuntary and, consequently, inadmissible. Essentially, however, Detective Tudor testified as follows: he advised Frances of his rights, Frances signed the advisement of rights form, and Frances agreed to speak to him, tr. p. 651; he believed that Frances had ingested cocaine based on his behavior, id. at 653; Frances told him that he had been in the vehicle and in the vehicle’s trunk in which Garton’s body had been found, id. at 655; and Frances told him that he did not kill Garton, id. at 670. These statements do not amount to a confession—the mere fact that Frances admitted to being in the vehicle and the trunk would not be enough evidence, on its own, for the jury to convict him of murder. Moreover, it was cumulative of Milton’s testimony that he had observed Frances in the vehicle a few days before Garton’s body was discovered.

Even assuming for argument’s sake that Frances’s statements to Tudor did amount to a confession, there is no evidence that the confession was involuntary. Although intoxication may be a factor in determining voluntariness, it is only when an accused is so intoxicated that he is unconscious as to what he is saying that his confession is inadmissible. Carter v. State, 490 N.E.2d 288, 291 (Ind. 1986). The emergency medical technician who evaluated Frances determined that he did not need medical treatment. Tr. p. 28-29. Moreover, as noted by the trial court, Frances was aware enough to drive a vehicle at high speeds for a long period of time and had managed to avoid a serious accident. Id. at 208. Furthermore, Frances signed a waiver of rights form and had sufficient presence of mind to invoke his rights when Detective

Tudor stated that he wanted to record the interview. Id. Under these circumstances, it is apparent that the trial court did not abuse its discretion in concluding that Frances made these statements to the detective voluntarily.

II. Sufficiency of the Evidence

Frances next argues that there is insufficient evidence supporting the murder conviction. When reviewing a claim of insufficient evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Weaver v. State, 702 N.E.2d 750, 752 (Ind. Ct. App. 1998). Instead, we consider only the evidence favorable to the verdict and all reasonable inferences that may be drawn therefrom. Id. Circumstantial evidence alone may be sufficient to support a conviction. Robinson v. State, 730 N.E.2d 185, 194 (Ind. Ct. App. 2000). We will affirm the conviction unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000). To convict Frances of murder, the State was required to prove beyond a reasonable doubt that he knowingly killed Garton. I.C. § 35-42-1-1.

The record reveals that, at the time of Garton's death, she and Frances had been in a tumultuous romantic relationship for six months. Garton's mother observed bruising all over Garton's legs shortly before her death. While Garton was away on vacation, Frances telephoned her mother every day, at all hours of the day and night, to learn when Garton would return home.

On July 21, 2004, Cassaday observed Garton walking down an alley, headed for Frances's residence, and although Cassaday expected to see Garton later that evening, he did

not see her again. Also on July 21, 2004, Brown observed Garton and Frances arguing. Later that evening, Brown asked Frances where Garton was, and Frances replied that her mother had picked her up, which was not true.

On July 27, 2004, Milton observed Frances exit from a vehicle that was parked in an alley. Milton testified that Frances “scared me, it was just like a shiver, you know, something it wasn’t right” Tr. p. 424. Milton had, in the past, heard Frances refer to Garton as “Bitch” on more than one occasion. Id. at 440-41.

On July 29, 2004, an Indianapolis police officer responded to a call regarding a foul odor emanating from a vehicle. Upon looking inside the vehicle’s trunk, he discovered Garton’s badly decomposed body. That evening, Brown received a phone call from Frances, who wanted to know what was going on. Brown replied that there were many police officers surrounding the vehicle and Frances immediately asked whether they were around the trunk. Brown stated that the officers had found a dead body inside the trunk and Frances responded that it was Garton.

On July 31, 2004, Frances led police officers in a thirty- to forty-minute high speed chase. Upon being apprehended, Frances admitted that “I killed that bitch” Id. at 682. Frances later told Detective Tudor that he had been in the vehicle and the trunk of the vehicle where Garton’s body had been found.

It is apparent that this evidence, albeit circumstantial, is sufficient to support Frances’s murder conviction. The evidence establishes motive—the tumultuous, possibly abusive, relationship with Garton—and opportunity. It establishes that Garton was last seen in

Frances's company and that they had been arguing. It places Frances in the vehicle in which Garton's body was found. It also establishes, with Frances's own words, that he knew that Garton's body was in the vehicle's trunk and that he "killed that bitch[.]" Id. Thus, a reasonable factfinder could have inferred from this evidence that Frances knowingly killed Garton.

Frances makes much of the fact that the forensic pathologist could not state that Garton died of strangulation within a reasonable medical certainty. Id. at 325. Additionally, the forensic pathologist could not determine whether blood was present on the outside of her body because her clothing was stained with putrid fluid. Id. at 341. The pathologist's inability to determine an exact cause of death is of no moment, however, inasmuch as cause of death is not an element of the offense of murder. Wilson v. State, 432 N.E.2d 30, 33 (1982). Furthermore, the evidence supports a reasonable inference that this was a homicide. Garton's body was left to decompose in a trunk, which does not logically lead to a conclusion that her death was accidental or innocent. Thus, the pathologist's inability to determine cause of death does not affect our conclusion that the evidence was sufficient.

Frances also argues that the State failed to establish the corpus delicti³ for murder in this case. A crime may not be proved based solely on a confession; rather, the State must provide independent evidence that a crime was committed. Workman v. State, 716 N.E.2d 445, 447 (Ind. 1999). But this evidence need not prove that a crime was committed beyond a reasonable doubt; instead, it must merely provide an inference that a crime was committed.

³ "Corpus delicti" means "[t]he fact of a transgression; actus reus." Black's Law Dictionary 346 (7th ed. 1999).

Id. at 447-48. This inference of a crime may be established by circumstantial evidence. Id. at 448. The primary purpose of this rule is to reduce the risk of convicting a defendant based on his confession to a crime that did not occur. Willoughby v. State, 552 N.E.2d 462, 466 (Ind. 1990).

Here, as noted above, there is a wealth of circumstantial evidence—apart from his admission to Deputy Morgan that he killed Garton—supporting an inference that a crime was committed. Garton’s badly decomposed body was found in a locked trunk. The trial court observed that it was for the jury to decide whether Garner could have consumed enough drugs to kill herself, place herself in a trunk, and close the lid, or whether, instead, she was a murder victim. Id. at 700. The underlying circumstances support an inference that a crime—murder—was committed. Thus, the trial court properly concluded that the State sufficiently satisfied the corpus delicti rule.

III. Frances’s Sentence

Finally, Frances argues that the trial court was without authority to impose enhanced sentences and also order them to be served consecutively to one another. Frances pleaded guilty to three D felonies, for which the advisory sentence is one and one-half years.⁴ I.C. §

⁴ Indiana’s sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code § 35-38-1-7.1, § 35-50-2-1.3. Frances committed his criminal offenses before this statute took effect but was sentenced after the effective date. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

35-50-2-7(a). The trial court sentenced him to two years of imprisonment on each count and ordered the sentences to be served concurrently pursuant to the plea agreement. Subsequently, Frances was convicted of murder, for which the advisory sentence is fifty-five years. *Id.* at § -3(a). The trial court sentenced him to sixty-five years, to be served consecutively to the two-year sentence for an aggregate executed sentence of sixty-seven years.

Frances argues that Indiana’s new sentencing scheme only empowers a trial court to impose a consecutive sentence if it imposes the advisory sentence for that crime. Indiana Code section 35-50-2-1.3(c) provides, in relevant part, as follows:

In imposing consecutive sentences in accordance with I.C. 35-50-1-2 . . . a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

Frances argues that this statute authorizes the trial court to impose only advisory, consecutive sentences.

This argument highlights a split of authority on our court. In analyzing the amended sentencing statutes, different panels of this court have reached different conclusions

While our Supreme Court has not explicitly ruled which sentencing scheme applies in these situations, a recent decision seems to indicate the date of sentencing to be critical. *Prickett v. State*, 856 N.E.2d 1203 (Ind. 2006). The defendant in *Prickett* committed the crimes and was sentenced before the amendment date. In a footnote, our Supreme Court stated that “[w]e apply the version of the statute in effect at the time of Prickett’s sentence and thus refer to his ‘presumptive’ sentence, rather than an ‘advisory’ sentence.” *Id.* at *3 n.3 (emphasis added). Therefore, since Frances was sentenced on April 18, 2006—nearly one year after the effective date—we will apply the amended statute.

regarding the interaction between Indiana Code sections 35-50-1-2(c) and -1.3(c). In White v. State, we found that trial courts are authorized to impose enhanced, consecutive sentences:

Indiana Code § 35-50-2-1.3 instructs: “In imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence[.]” We conclude that when the General Assembly wrote “appropriate advisory sentence,” it was referring to the total penalty for “an episode of criminal conduct,” which, except for crimes of violence, is not to exceed “the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.” See Ind. Code § 35-50-1-2(c). In other words, the advisory sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted is the “appropriate advisory sentence” for an episode of non-violent criminal conduct. Indiana Code § 35-50-1-2 in no other way limits the ability of a trial court to impose consecutive sentences. In turn, Indiana Code § 35-50-2-1.3, which references Indiana Code § 35-50-1-2, imposes no additional restrictions on the ability of trial courts to impose consecutive sentences.

849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied.

In Robertson v. State, a separate panel rejected the White analysis and, instead, held that “the advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and imposes a separate and distinct limitation on a trial court’s ability to deviate from the advisory sentence for any sentence running consecutively.” 860 N.E.2d 621, 625 (Ind. Ct. App. 2007), trans. granted. The Robertson court expressed concern about the result in White:

Our concern with the analysis in White is that (1) it renders the language in IC 35-50-2-1.3 surplusage since the consecutive sentencing statute, IC 35-50-1-2, clearly limits the total of the consecutive sentences for non-violent offenses to the advisory sentence for the next highest class of felony; and (2) nothing in the advisory sentencing statute, IC 35-50-2-1.3, limits its application to non-violent offenses. Although the White decision argues that the legislature could not have intended the results the statute is capable of generating, the argument

is moot “[w]hen the language of the statute is clear and unambiguous.” 849 N.E.2d at 742-43.

Id. at 624-25 (citation omitted). Ultimately, the Robertson court remanded the case to the trial court with instructions that it reduce the enhanced, consecutive sentence to the advisory sentence.

Recently, another panel of our court denounced the Robertson analysis and, instead, applied the White analysis. Barber v. State, --- N.E.2d ---, No. 49A02-0608-CR-689, slip op. at 9 (Ind. Ct. App. Apr. 9, 2007).⁵ Specifically, the Barber court found that the amended sentencing statutes do not limit a trial court’s authority to impose enhanced, consecutive sentences:

Indiana Code § 35-50-2-1.3 serves another very important purpose. In the wake of Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), our legislature transformed Indiana’s sentencing scheme from a presumptive scheme to an advisory scheme. Under the former presumptive scheme, a trial court was required to impose the “presumptive” sentence for a felony conviction unless the court found aggravating circumstances to enhance the sentence or mitigating circumstances to reduce the sentence. Under the new advisory scheme, trial courts are generally not required to use an advisory sentence. See I.C. § 35-50-2-1.3 (“Except as provided in subsection (c), a court is not required to use an advisory sentence.”). Because an advisory sentence is in most cases exactly that—advisory—the legislature included subsection (c) of Indiana Code § 35-50-2-1.3 to remind Indiana’s trial courts of those statutory provisions that do require the “use” of an advisory sentence[, in relevant part,] in imposing consecutive sentences in accordance with Indiana Code § 35-50-1-2 We acknowledge that nothing in Indiana Code § 35-50-2-1.3(c) limits its application to any specific subsections of Indiana Code §§ 35-50-1-2, 35- 50-2-8, and 35-50-2-14, but each of those statutes only includes one subsection that refers to advisory sentences.

⁵ The parties do not address Barber because it was handed down after this case was fully briefed.

Id. at 9-10 (emphases in original).

We are persuaded that the better analysis is that set forth in White and Barber. When we read Indiana Code section 35-50-2-1.3 in conjunction with section 35-50-1-2, it is apparent that the reference to the “appropriate advisory sentence” was meant to apply to situations involving the single episode of criminal conduct limitation on consecutive sentencing. This statute was not intended to place any other limits on a court’s ability to impose consecutive sentences. Contrary to the conclusion of the Robertson court, we do not believe that this interpretation renders the statutory language to be surplusage; rather, it provides clarification regarding what advisory sentence is to be used when the single episode of criminal conduct limitation is applicable. We also note that a troubling consequence of the Robertson analysis would be that trial courts would be prohibited from imposing enhanced, consecutive sentences on the worst offenders. That cannot have been the intent of our legislature. Consequently, we find that the trial court herein had the authority to impose enhanced, consecutive sentences, and did not err by doing so.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.