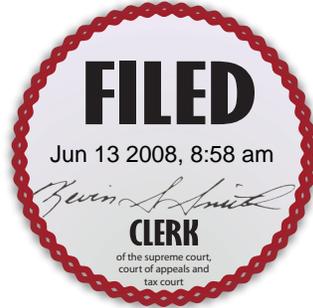


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**IN THE
COURT OF APPEALS OF INDIANA**

RICKY GORDON,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0711-CR-621
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0604-FB-71699
49G01-0604-FB-64172

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Ricky Gordon appeals his convictions for two counts of Class B felony robbery and two counts of Class B felony criminal confinement.¹ We affirm.

Issue

Gordon raises two issues, which we consolidate and restate as whether there was sufficient evidence to support his convictions.

Facts

On March 31, 2006, John Lindsey entered a Village Pantry convenience store in Indianapolis. Lindsey displayed a rifle and asked for money. Genia Pullen, the cashier emptied the cash register, giving Gordon \$32. Gordon followed Lindsey into the store, walked behind the counter, and asked Pullen for more money. The two men left when two customers entered the store. Pullen immediately reported the incident to police, but Gordon and Lindsey were not apprehended.

On April 7, 2006, Anthony Hendricks was working at another Village Pantry convenience store in Indianapolis. Hendricks's two young children were at the store with him and were putting money into the safe when Lindsey entered and displayed a rifle. Lindsey ordered the children to go to the back of the store and lay down, and they complied. Hendricks opened the cash registers. Lindsey grabbed the money and left the store.

¹ Gordon also was convicted of Class D felony resisting law enforcement, Class A misdemeanor criminal recklessness, and Class A misdemeanor resisting law enforcement. He does not challenge these convictions.

At the same time, Indianapolis Metropolitan Police Officer Chris Poindexter was on patrol when he drove past the Village Pantry and observed a black pickup truck backed into a parking spot with the parking lights on and the engine running. Officer Poindexter pulled into the parking lot to investigate. Officer Poindexter was looking at his computer when he heard tires squealing and saw “a black pickup truck coming out at a high rate of speed and going northbound on Guion Road.” Tr. p. 86. Officer Poindexter followed the truck until he received a dispatch that the Village Pantry had been robbed. Officer Poindexter then initiated a traffic stop by activating his lights. After Officer Poindexter turned on his siren, the truck stopped.

As Officer Poindexter began to get out of his car, the truck “took off.” Id. at 89. During the pursuit, the passenger, Lindsey, aimed a rifle out of the truck and shot at Officer Poindexter’s patrol car. The pursuit continued and the two men in the truck eventually fled on foot until they were apprehended. After Gordon was apprehended, Pullen identified Gordon in a photo array as one of the men who committed the March 31 robbery.

On April 12, 2006, the State charged Gordon with Class B felony robbery for the March 31 robbery. That same day, in a separate information, the State charged Gordon with Class A felony attempted murder, Class B felony robbery, two counts of Class B felony criminal confinement, Class D felony resisting law enforcement, Class A misdemeanor criminal recklessness, Class A misdemeanor resisting law enforcement, and Class A misdemeanor possession of marijuana for the April 7 robbery. The State later

amended the second charging information, which omitted the attempted murder and possession of marijuana charges.

On September 17, 2007, a jury found Gordon guilty as charged for the April 7 robbery. On September 19, 2007, in a separate trial, a jury found Gordon guilty as charged for the March 31 robbery. Gordon now appeals.

Analysis

In a consolidated appeal, Gordon now challenges the sufficiency of the evidence to support his convictions. Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. If the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm the conviction. Id.

I. March 31 Robbery

Gordon first argues that there was insufficient evidence to establish that he committed the March 31 robbery. He argues the trial court abused its discretion in admitting the photo array from which Pullen identified him. He also claims it was fundamental error when the trial court failed to give a limiting instruction regarding the impeachment of Lindsey's testimony that he committed the robbery with someone other than Gordon. Without this evidence, Gordon claims there is insufficient evidence that he committed the robbery.

Gordon argues that the photo array was improperly admitted into evidence because it was unduly suggestive. However, we need not determine whether the photo array was improperly admitted because Pullen identified Gordon at trial.

The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. A pre-trial identification may occur in a manner so suggestive and conducive to mistaken identification that permitting a witness to identify a defendant at trial would violate the Due Process Clause. Nevertheless, a witness who participates in an improper pretrial identification procedure may still identify a defendant in court if the totality of the circumstances shows clearly and convincingly that the witness has an independent basis for the in-court identification.

Swigart v. State, 749 N.E.2d 540, 544 (Ind. 2001) (citations omitted).

To determine whether a witness had an independent bases for the in-court identification, we consider the amount of time the witness was in the presence of the defendant; the distance between the two; the lighting conditions; the witness's degree of attention to the defendant; the witness's capacity for observation; the witness's opportunity to perceive particular characteristics of the defendant; the accuracy of any prior description of the defendant by the witness; the witness's level of certainty at the pretrial identification; and the length of time between the crime and the identification. Id.

Here, Pullen testified that on March 31, 2006, she was standing behind the counter when one man walked into the store, pulled out a rifle, and asked her to hand over the money. “[T]wo seconds” after the first man entered the store, another man wearing a

“winter flannel and a hat” entered the store. Tr. pp. 329, 330. The second man came behind the counter and asked if there was any more money in the cash register or in the lottery machine. The second man also asked Pullen about a printer and asked for her I.D. Pullen described the second man as skinny with a mustache and about her height. She described him as “smaller” than the first man. Id. at 332. Pullen testified that she was “[v]ery close” to the second man. Id. at 334. The two men left when two customers entered the store, and Pullen called 911. When police arrived, Pullen described the men to the police.

On April 4, 2006, Pullen met with police to look at photographs of potential suspects. She looked at approximately 500 pictures and although she did not identify Gordon, whose picture was not included in the photographs, she did pick out photographs of individuals whose facial features “kind of looked like the ones that robbed [her].” Tr. p. 339. After Gordon was apprehended following the April 7 robbery, Pullen identified Gordon’s picture out of a computer generated photo array as the second robber. Pullen also unequivocally identified Gordon at trial. See Tr. p. 346.

Although Pullen did not spend a significant amount of time with Gordon, his presence was not fleeting. Pullen and Gordon were both behind the counter and were very close to one another. Gordon asked about additional money and money from the lottery machine. He also asked Pullen about a printer and for her identification. There is no suggestion that the lighting in the store was other than that of an ordinary convenience store, and there is no indication that Pullen’s capacity for observing Gordon was

diminished. At the time of the offense, there were no other customers in the store, and during the offense all appeared to have remained relatively calm.

Pullen accurately described Gordon immediately after the offense. She did not identify him out of the 500 photographs in which his picture was not included. Instead, she chose the pictures of men who resembled Gordon to help “catch the people that robbed [her].” Id. at 340.

We conclude that the totality of the circumstances shows clearly and convincingly that Pullen had an independent basis for her in-court identification of Gordon. See Swigeart, 749 N.E.2d at 545. Pullen’s in-court identification of Gordon is substantive evidence to establish that he committed the March 31 robbery. Because there is independent evidence of Gordon’s identity, any error that resulted from the trial court’s failure to give a limiting instruction to the impeachment of Lindsey’s testimony that someone other than Gordon committed the robbery with him did not result in fundamental error.² See Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006) (observing that 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). Accordingly, there is sufficient evidence that Gordon committed the March 31 robbery.

² Gordon bases the alleged fundamental error on the lack of identity evidence when he argues, “there is not sufficient circumstantial or other evidence to sustain the robbery verdict without the statement. Allowing a verdict based in part upon that statement violates due process. Hence, the doctrine of fundamental error should apply.” Appellant’s Br. p. 22.

II. April 7 Robbery

Gordon also argues that there is insufficient evidence that he acted as Lindsey's accomplice in the April 7 robbery and confinement. A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. Ind. Code § 35-41-2-4. In determining whether a person aided another in the commission of a crime, we consider the following four factors: (1) the defendant's presence at the scene of the crime; (2) the defendant's companionship with another engaged in criminal activity; (3) the defendant's failure to oppose the crime; and (4) the defendant's conduct before, during, and after the occurrence of the crime. Garland v. State, 788 N.E.2d 425, 431 (Ind. 2003).

Here, Officer Poindexter observed a black pick-up truck backed into a parking space with the parking lights on and the engine running at the time the robbery was committed. Because it is undisputed that Lindsey actually was inside robbing the store, it reasonably can be inferred that Gordon was waiting in the truck. Thus, Gordon was in the proximity of the crime seen when the robbery occurred.

When Gordon was apprehended, he referred to Lindsey as his "partner." Tr. p. 130. Regardless of whether Gordon was referring to Lindsey as his partner in the commission of the offense, this statement clearly establishes that Gordon and Lindsey were associates or companions in some form or fashion. Accordingly, Gordon was the companion of someone who was engaged in criminal activity.

Although Gordon claims there is no evidence that he knew Lindsey had a gun or intended to rob the store, this is simply a request to reweigh the evidence. It is

undisputed that Lindsey was armed with a rifle, not a handgun, when he committed this offense. Further, Gordon waited for Lindsey in a small pick-up truck that was registered to Gordon. Given these specific facts, it was reasonable for the jury to infer that Gordon had knowledge of the rifle at the time Lindsey committed the offense. There is no indication that Gordon opposed the crime.

Finally, when considering Gordon's conduct during and after the crime, the jury could reasonably infer that Gordon was acting as an accomplice to Lindsey. Gordon waited in the truck in the parking lot with the engine running while Lindsey committed the crime. Further, Officer Poindexter heard tires squealing and observed the truck pulling out of the parking lot at a "high rate of speed." Tr. p. 86. In addition, Gordon did not stop the truck with Officer Poindexter activated his lights. It was only when Officer Poindexter "flicked" his siren that Gordon stopped. Id. at 89. Then, as Officer Poindexter began to get out of his car, Gordon drove off, and a police chase ensued. During the chase, Lindsey fired the rifle at Officer Poindexter. The road dead-ended and the two men fled on foot. Gordon's actions are indicative of him aiding Lindsey in the commission of the robbery and confinement.

Although Gordon likens the facts of this case to those in Lipscomb v. State, 254 Ind. 642, 261 N.E.2d 860 (1970), the differences between the two cases are significant. In that case, Lipscomb purchased and paid for gasoline and cigarettes and returned to his automobile while his companion, Williams, robbed the gas station attendant and then returned to the car. There was no evidence that Lipscomb had any knowledge of the robbery, that Lipscomb could have heard Williams commit the robbery, that a weapon

was ever displayed, or that Lipscomb left the station in haste or made any attempt to hide his identity. Our supreme court concluded, “The mere presence of the appellant seated in his car at the station while Williams robbed the attendant inside the station office is insufficient in itself to prove participation.” Lipscomb, 254 Ind. 642 at 644, 261 N.E.2d at 861.

Gordon was not simply an oblivious bystander in this case. Gordon’s actions are sufficient evidence from which the jury could have concluded he was an accomplice to Lindsey’s robbery and confinement.

Conclusion

There is sufficient evidence to support Gordon’s robbery and confinement convictions. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.