

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

TANISHA D. WILLOUGHBY
Marion County Public Defender
Indianapolis, Indiana

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS DAY,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0712-CR-1075
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John W. Hammel, Judge
Cause No. 49F24-0511-FD-202135

July 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dennis Day appeals his conviction, after a bench trial, of criminal recklessness with a deadly weapon, a class D felony.¹

We affirm.

ISSUES

1. Whether the trial court erred when it admitted statements made by Day while in police custody.
2. Whether sufficient evidence supports Day's conviction.

FACTS

The following evidence was primarily established through the testimony of eyewitnesses at Day's trial. Since early 2005, Day had lived at 10437 East Thompson Road, which is located in the eastern part of Marion County. There were approximately fifty feet between the east side of Day's home to his neighbor. There were approximately one hundred feet from the west side of Day's home to his neighbor. There was a subdivision approximately seventy feet north of Day's residence, and an interstate highway approximately one-quarter mile south of his residence.

On November 23, 2005, at around 12:30 a.m., Day began firing a 12- gauge semi-automatic Mossberg shotgun from his home. One of Day's neighbors called in a complaint of shots-fired. Deputy Cress of the Marion County Sheriff's Department responded. As Deputy Cress approached the area around 12:36 a.m., he heard one or two

¹ Ind. Code § 35-42-2-2.

shots fired from the southwest.² Deputy Cress parked his vehicle and waited for backup. Officers Herrick and Koeller arrived. The officers determined that the shots had been fired from Day's residence. As the officers approached Day's residence, a shot rang out. Officer Herrick testified that he heard the bullet "whiz by" over his head. (Tr. 73). Officer Cress also stated that the shot sounded like it went over their heads. The officers immediately found cover and called for additional backup.

Once additional backup arrived, the officers surrounded Day's residence. The officers made contact with Day by telephone and informed him of their presence. They then knocked on his door and Day opened the door and allowed the police inside. Day consented to the officers' search of his home. They recovered a Mossberg 12-gauge shotgun, which smelled as if it had just been fired. The shotgun contained one spent round and one live round. The officers also recovered four spent rounds and four live rounds from Day's property.

Officer Cress handcuffed Day and placed him in the back seat of his patrol car. While waiting for a transport vehicle, Cress asked the defendant why he was so upset. Day answered Cress' question and then stated that he was sorry for what had happened and that he would like to apologize to another officer for the events that had just taken place. Cress does not recall warning Day of his *Miranda* rights before their conversation.

On November 23, 2005, the State charged Day with criminal recklessness with a deadly weapon, a class D felony. A bench trial was held on February 22, 2007. During

² In the vicinity of Day's home.

the trial, the trial court admitted testimony about Day's apology made to Officer Cress in November, 2005. On May 17, 2007, the trial court found Day guilty.

DECISION

1. Admission of Evidence

Day argues that the trial court abused its discretion in admitting testimony about his apology because Officer Cress failed to give him his *Miranda* warning. (Day's Br. at 8). We agree.

The admission of evidence is within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. A decision is an abuse of discretion if it is clearly against the logic and effect of the facts and circumstances before the court. In reviewing the decision, we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor.

Williams v. State, 782 N.E.2d 1039, 1040 (Ind. Ct. App. 2003) (quotations and citations omitted).

A person who has been "taken into custody or otherwise deprived of his freedom of action in any significant way" must, before being subjected to interrogation by law enforcement officers, be advised of his rights to remain silent and to the presence of an attorney and be warned that any statement he makes may be used as evidence against him. *Loving v. State*, 647 N.E.2d 1123, 1125 (Ind. 1995) (citing *Miranda v. Arizona*, 384 U.S. 436, 444). The standard for determining if police conduct toward a suspect constitutes "interrogation" is whether the police should know that their words or actions are reasonably likely to elicit incriminating responses from the suspect. *Alford v. State*, 699 N.E.2d 247, 250 (Ind. 1998).

Day was handcuffed and placed in the back seat of Officer Cress' patrol car. Day was physically restrained and significantly deprived of his freedom of action. Officer Cress then asked Day the question, "Why are you so upset?" The question was likely to elicit an incriminating response from the suspect. Officer Cress was seeking a reason as to why Day had just committed a crime. Any reason given by Day as to why he committed the crime simultaneously incriminates him, by implying that he did in fact commit the crime. Furthermore, Officer Cress testified that Day smelled heavily of an alcoholic beverage. Officer Cress should have known that Day's intoxication could have led him into making incriminating statements. Therefore, the trial court abused its discretion in admitting testimony about Day's statement of apology because the evidence did not establish that he had been advised of his *Miranda* rights.

Although, the assertion that the trial court erred in admitting testimony about Day's incriminating apology to Officer Cress is irrefutable, our analysis does not end there because:

Statements obtained in violation of *Miranda* and erroneously admitted are subject to harmless error analysis. The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt which satisfies the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction.

Morales v. State, 749 N.E.2d 1260, 1267 (Ind. Ct. App. 2001) (internal citations omitted).

Day's conviction is supported by substantial independent evidence of his guilt,³ as noted in the facts by the testimony of the responding officers to the scene combined with

³ The substantial independent evidence of guilt is further explained in the subsequent section pertaining to the sufficiency of the evidence.

Day's own testimony that he fired the shotgun outside a few times that night. (Tr. 124). We find that there is no substantial likelihood that the testimony about Day's apology contributed to the conviction. The trial court's error did not deny Day a fair trial. Therefore, the trial court's error in admitting testimony about Day's apology was harmless error.

2. Sufficiency of the Evidence

Day argues that the evidence presented at trial was insufficient to support his conviction. We disagree.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if any inference may reasonably draw from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (quotations and citations omitted).

Pursuant to Indiana Code section 35-42-2-2(b)(1), a person who recklessly knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness. If the person commits this act while armed with a deadly weapon, it is a class D felony. For purposes of this crime, a "substantial risk" is a risk that "has substance or actual existence" of causing harm to another person. *Elliot v. State*, 560 N.E.2d 1266, 1267 (Ind. Ct. App. 1990).

Day attempts to analogize his case to *Elliot*, a case in which we reversed a trial court's finding of criminal recklessness with a deadly weapon. In *Elliot*, the defendant fired a pistol, aimed upward at approximately a ten-degree angle, towards adjacent uninhabited fields and woodlands. Noting that no evidence was introduced demonstrating the presence of anyone in the woodlands or fields, we found that Elliot's actions did not create a "substantial risk of bodily injury" to another person within the meaning of the statute defining crime of criminal recklessness with a deadly weapon. *Id.* at 1267.

This case is distinguishable from *Elliot*. Here, the trial court heard substantial evidence that established the presence of several people who lived within close proximity of Day's line of fire. Officer Cress testified that he heard a shot go over his head, and Officer Herrick testified that he heard a bullet "whiz by." (Tr. 73). The shootings in the instant case occurred in a considerably less rural locale than in *Elliot*. Day's neighbor's home to his east was only about fifty feet away; his western neighbor's home was only about one hundred feet away; an interstate highway was only about a quarter mile south of Day's location; and a subdivision with over one hundred homes was only about seventy feet north of Day's home. Further, Elliot was shooting a pistol, whereas, Day was shooting a 12-gauge shotgun with a muzzle velocity of 800 to 900 feet per second. A random round fired to the north, east, west or south, or towards the officers as they approached Day's house could have caused substantial bodily injury to another person.

We find this case to be much more like *Smith v. State*, 688 N.E.2d 1289, 1291 (Ind. Ct. App. 1997). In *Smith*, the defendant fired his gun at least six times in his

backyard while shooting at an old car, which was within fifty yards of approximately ten residential homes. Further, one home was in the direct line of gunfire and a group of people were in the street near the defendant's backyard at the time of the gunfire. We found that there was sufficient evidence that Smith's conduct had created actual and substantial risk of bodily injury to another person and affirmed his conviction for criminal recklessness. *Id.* at 1291.

Here, there were several residences within a few yards of Day's residence. Moreover, three officers, and at least one pedestrian were in or near Day's line of fire. Thus, we find that (1) the evidence establishes that Day's acts created a substantial risk of bodily injury to another person; and (2) the evidence is sufficient to support Day's conviction for criminal recklessness as a class D felony.

Affirmed.

NAJAM. J., and BROWN, J., concur.