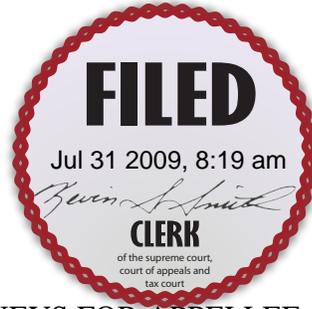


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

NICHOLAS JAMES KNOX,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0902-CR-48

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0806-MR-3

July 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Nicholas James Knox appeals his murder conviction. We affirm.

Issues

Knox raises the following issues for review:

- I. Did the trial court abuse its discretion in denying his motion for a separate trial from his co-defendant?
- II. Did the trial court abuse its discretion in denying his motion to dismiss a juror?
- III. Did the State present sufficient evidence to sustain his murder conviction?

Facts and Procedural History

On the evening of July 16, 2006, shots were fired at the Wagner Street residence of Tyrone Alexander. Neighbor Fred Kerry heard the shots, called 911, and looked out his window. He saw one Caucasian and two African-Americans moving quickly across the street. The Caucasian man, whom Kerry later identified as Knox, was adjusting the waistband of his shorts.

Minutes later, Elkhart Police Officer Scott Hupp arrived at the residence and found Alexander lying face-down on the sidewalk with bullet wounds in his back. Officer Hupp also observed that the window of the residence was broken. Alexander died, and the autopsy revealed that he had been shot eight times.

Police found shell casings and spent bullets at the scene. They also found a .45 caliber handgun in front of the house next door and a .9 millimeter handgun under some bushes on a neighboring street.

Later that night, Elkhart Police Officer Scott Hauser went to the hospital to question a patient who had checked in with a gunshot wound to the leg. The patient, Ricardo Telfer, told police that he had gone to the Wagner Street residence to buy marijuana from a drug dealer known as “Little T.” Tr. Vol. I at 141, 154.¹ He admitted that he had a .45 caliber handgun in his possession at the time. While at the residence, Telfer saw two individuals on the porch with guns. The drug dealer also had a gun and was standing at the door. Telfer said he believed that the drug dealer was being robbed. *Id.* at 146. A struggle ensued between the drug dealer and the two individuals, and Telfer stated that he was forced to exit the porch through a window. *Id.* at 179-80. He later said that he went to “Ty’s” house, a struggle broke out, and he and “Ty” fell out the window. *Id.* at 227-28.

Firearms examiner Michael Ennis determined that some of the bullets and fragments recovered from Alexander’s body were .38 caliber specimens. Ennis traced the bullets and fragments to a .38 caliber pistol recovered from Mark Eason, who had pled guilty to using it after July 16, 2006, to rob a store. Eason had received the pistol from his brother, who had received it from someone after the night of the shooting. Tr. Vol. III at 49-50. Police later learned that Knox had been seen with Eason on the day of the shooting and that Knox had displayed a pistol in his waistband. *Id.* at 48.

¹ We received four volumes of trial transcript in this case; each volume was paginated separately. We note, however, that Indiana Appellate Rule 28(A)(2) states, “[t]he pages of the Transcript shall be numbered consecutively regardless of the number of volumes the Transcript requires.”

During their investigation, Elkhart police interviewed Erin Edel, who reported that Knox had told her he robbed drug dealers. Edel said Knox told her that the drug dealer on Wagner Street put up a fight and was shot, and that he did some of the shooting. *Id.* at 112.

On June 18, 2008, the State charged Knox and Telfer with murder and class B felony conspiracy to commit robbery while armed with a deadly weapon. While Knox was in the Elkhart County Jail awaiting trial, he told fellow inmate Tony Horton that he shot Alexander during a robbery and that Alexander had fallen out a window. *Id.* at 277-79.

On October 23, 2008, Knox filed a motion for separate trials. On November 12, 2008, the trial court denied the motion. A jury trial began on November 17, 2008. After voir dire but before evidence was presented, Knox filed a motion to dismiss juror Scott Sanchez, who had disclosed to the bailiff that his wife was the teacher of the deputy prosecutor's son. The trial court questioned Sanchez and declined to dismiss him. However, the trial court ordered the deputy prosecutor not to have any contact with her son's school during the trial. Near the end of the trial, Knox renewed his motion for separate trials, and the trial court denied his motion.

On November 20, 2008, the jury found Knox guilty as charged, and the trial court entered judgment of conviction on both counts. At sentencing, the trial court vacated Knox's conspiracy to commit robbery conviction on double jeopardy grounds. Knox appeals his murder conviction. Additional facts will be provided as necessary.

Discussion and Decision

I. Separate Trials

Knox contends that the trial court erred in denying his motion for separate trials. Indiana law allows criminal defendants to be joined in a single prosecution. Ind. Code § 35-34-1-9. However, upon the defendant's motion, the trial court may order a separate trial if it determines that severance is necessary to protect and promote the defendant's right to a speedy and fair trial. Ind. Code § 35-34-1-11(b);² *Lee v. State*, 684 N.E.2d 1143, 1147 (Ind. 1997). The decision to grant or deny a motion for separate trials is a matter within the trial court's discretion. *Id.* We review such cases for an abuse of discretion, measuring the trial court's decision based on what actually occurred at trial rather than what is alleged in the motion. *Id.*

Knox alleges that co-defendant Telfer had made statements implicating him and that Telfer's self-incrimination protection prevented him from cross examining Telfer. In *Bruton v. U.S.*, 391 U.S. 123, 126 (1968), the United States Supreme Court addressed the issue of admissibility of co-defendants' pre-trial statements in joint trials. The Court concluded that a

² Indiana Code Section 35-34-1-11 provides in part,

(b) Whenever two (2) or more defendants have been joined for trial in the same indictment or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect:

- (1) a joint trial at which the statement is not admitted into evidence;
- (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
- (3) a separate trial for the moving defendant.

In all other cases, upon motion of the defendant or the prosecutor, the court shall order a separate trial of defendants whenever the court determines that a separate trial is necessary to protect a defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of a defendant.

substantial risk exists that the jury might consider one co-defendant's incriminating extrajudicial statement against the other co-defendant as well. *Id.* Because the former cannot be forced to take the stand, the latter is denied his Sixth Amendment right to confront and cross examine witnesses against him. *Id.* at 137.

A co-defendant's statements violate *Bruton* only if they "facially incriminate" another defendant. *Fayson v. State*, 726 N.E.2d 292, 294 (Ind. 2000), citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). "[T]he mere fact that one defendant implicates another does not entitle the latter to a separate trial." *Lee*, 684 N.E.2d at 1147 (citations and quotation marks omitted). "There is not a constitutional right to be protected from damaging evidence." *Id.* (citations and quotation marks omitted). "Such protection would result in separate trials as a matter of right for all cases with more than one defendant." *Id.* (citation and quotation marks omitted).

Here, co-defendant Telfer's statements did not incriminate Knox. Instead Telfer merely stated that when he went to Alexander's residence to buy marijuana, he saw two individuals on the porch who appeared to be robbing Alexander at gunpoint. When a struggle erupted, Telfer jumped or fell out of the porch window along with Alexander. Telfer gave no statements identifying the two individuals or implicating Knox.³ Instead, Knox was implicated by his *own* statements to Edel and Horton. First, he told Edel that he

³ Knox suggests that he was unfairly denied the opportunity to cross examine his co-defendant Telfer on the issue of race. However, Telfer made no statements at all regarding the racial identity of the robbers. Thus, this vacuum of information cannot be said to have implicated Knox. Instead, it was eyewitness Kerry who implicated Knox by identifying him as the Caucasian whom he observed leaving the scene. Kerry was not a co-defendant. Therefore, Knox's racial identity argument lacks merit.

did some of the shooting when the Wagner Street drug dealer put up a fight. In addition, while in jail awaiting trial, he told Horton that he shot Alexander during a robbery and that Alexander had fallen out a window. Moreover, neighbor Kerry gave independent eyewitness testimony identifying Knox as one of the individuals he observed leaving the scene immediately after the shooting. Finally, Eason provided testimony that linked Knox to the .38 caliber pistol that the firearms examiner determined was used to kill Alexander. In sum, Knox has failed to establish that he was denied his right to a fair trial based on Telfer's statements. As such, the trial court acted within its discretion in denying Knox's motion for separate trials.

II. Denial of Motion to Dismiss Juror

Knox also contends that the trial court erred in refusing to dismiss juror Sanchez. Because Article 1, Section 13 of the Indiana Constitution guarantees a defendant the right to an impartial jury, a biased juror must be dismissed. *May v. State*, 716 N.E.2d 419, 421 (Ind. 1999). For this reason, Indiana Trial Rule 47(B) provides for alternate jurors to replace any juror who is disqualified or unable to perform his or her duties. The trial court has the opportunity to observe jurors firsthand and therefore is in a much better position than we to assess a juror's ability to serve without bias or intimidation and to decide the case according to the law. *Barnes v. State*, 693 N.E.2d 520, 523 (Ind. 1998). Thus, the trial court has "broad discretion in determining whether to replace a juror with an alternate, and we will only reverse such determinations where we find them to be arbitrary, capricious or an abuse of discretion." *May*, 716 N.E.2d at 421. We find an abuse of discretion only when the trial

court's decision placed the defendant in substantial peril. *Alvies v. State*, 795 N.E.2d 493, 499 (Ind. Ct. App. 2003), *trans. denied*.

Juror bias may be either actual or implied. *Id.* “Implied bias is attributed to a juror upon a finding of a certain relationship between the juror and a person connected to the case, regardless of actual partiality.” *Id.* Knox alleges implied bias on the part of Sanchez. In such cases, “the trial court should analyze such potential bias by considering the nature of the connection and any indications of partiality.” *Id.* In doing so, the trial court “must weigh the nature and extent of the relationship versus the ability of the juror to remain impartial.” *Id.*

After voir dire but before any evidence had been presented, juror Sanchez disclosed to the court that his wife was the teacher of the deputy prosecutor's son. The trial court questioned Sanchez outside the presence of the remaining jury members. Knox objected to Sanchez remaining on the jury, asserting that he would have used a peremptory challenge to strike Sanchez had the connection been disclosed during voir dire. The trial court conducted further questioning, during which Sanchez stated that he could be fair, that the connection between his wife and the deputy prosecutor's son did not affect his judgment in the case, and that he did not know the deputy prosecutor personally and had never even seen her before. Tr. Vol. I at 36-38. As a result, the trial court chose not to dismiss him.

We conclude that the relationship between juror Sanchez and the deputy prosecutor was tenuous. Moreover, he testified unequivocally that he could remain impartial. To the extent Knox bases his challenge on the speculative possibility of future contact between Sanchez and the deputy prosecutor at school functions, we note that the trial court ordered

the deputy prosecutor not to have any contact with her son's school during the remainder of the trial. Thus, Knox has failed to demonstrate that the trial court's decision not to dismiss Sanchez placed him in substantial peril. As such, the trial court acted within its discretion in refusing to dismiss Sanchez from the jury.

III. Sufficiency of Evidence

Finally, Knox contends that the State failed to present sufficient evidence to sustain his murder conviction. When reviewing a claim of insufficiency of evidence, we neither reweigh evidence nor judge witness credibility. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Rather, we consider only the evidence and reasonable inferences most favorable to the verdict. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

Ample probative evidence exists to support Knox's conviction. Eyewitness Kerry positively identified Knox as one of three individuals coming from the scene of the crime just moments after the shots were fired. The firearms examiner testified that the weapon used in the murder was the same .38 caliber pistol that Eason had used to commit a robbery soon after the night of the murder. Tr. Vol. IV at 92. Eason testified that he was with Knox on the day of the murder and that Knox had a pistol in his possession at that time. *Id.* at 48. Eason also stated that the .38 caliber handgun he used to commit the robbery was given to his brother sometime after the murder. Tr. Vol. III at 49-50. Moreover, Knox admitted to Edel that he had shot the Wagner Street drug dealer. *Id.* at 112. He also admitted to fellow jail inmate Horton that he had shot Alexander during a robbery and that Alexander had fallen out

a window. *Id.* at 277. To the extent Knox challenges Edel's testimony on the basis of her drug use and Horton's testimony on the basis of his unsavory criminal character, we note that these are merely invitations to reweigh evidence and judge witness credibility, which we may not do. Accordingly, we affirm Knox's murder conviction.

Affirmed.

MAY, J., and BROWN, J., concur.