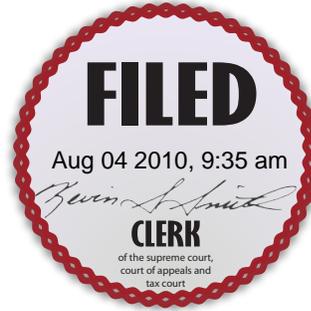


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**IN THE
COURT OF APPEALS OF INDIANA**

JUSTIN DAVIS,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-1001-CR-6
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARON SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0901-MR-14472

August 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Justin Davis appeals his convictions for murder,¹ two counts of robbery as class C felonies,² attempted robbery as a class C felony,³ and carrying a handgun without a license as a class A misdemeanor.⁴ Davis raises one issue, which we restate as whether the evidence is sufficient to sustain his convictions. We affirm.

The facts most favorable to Davis's convictions follow. In the early morning hours of December 5, 2008, Michael Nolan, Troy Brown, and Todd Neel were at Brown's house in Indianapolis. The men had some whiskey and some cocaine. When the men "[ran] out of cocaine," Brown and Nolan began to place calls to David Lewis, who went by the name "Black," and "started buzzing him to bring . . . some [cocaine] over." Transcript at 83, 85. The men were able to reach Lewis by phone at about 2:00 a.m., and Lewis said that he "would be back . . . in a little bit." *Id.* at 87. At approximately 4:00 a.m., Lewis and Davis arrived at Brown's house. While Brown purchased cocaine from Lewis, Nolan showed Davis a gun that Nolan desired to sell.

After about five minutes and after Brown had finished purchasing cocaine, Lewis and Davis left Brown's house and Brown closed the front door. After Brown had closed the door and sat down, Davis walked back in the door. Nolan asked Davis what was going on, and Davis said that Lewis had "took off and left him." *Id.* at 92. Nolan was sitting on a love seat, and Davis sat "on the edge of the love seat . . . on the arm closest to

¹ Ind. Code § 35-42-1-1 (Supp. 2007).

² Ind. Code § 35-42-5-1 (2004).

³ Ind. Code § 35-42-5-1 (2004); Ind. Code § 35-41-5-1 (2004).

⁴ Ind. Code § 35-47-2-1 (Supp. 2007).

the front door.” Id. at 204. Davis “chat[ted]” with the men over a period of about ten or fifteen minutes, and Nolan and Brown began “smoking the crack.” Id. at 207-208.

At a moment when Nolan had a “pipe up to his mouth” and “was using drugs,” Davis “just got up off the arm of the . . . love seat [and] shot [Nolan]” in the neck. Id. at 92-93, 213. Nolan “slumped over,” and Davis then “reached inside of [Nolan’s] hoodie and grabbed [a gun].” Id. at 93, 210.

Davis then pointed a gun at Brown and said “[g]ive me all your money,” and Brown reached into his pocket and gave Davis “all [his] money.” Id. at 93, 211. Davis pointed the gun at Neel and said, twice, “[g]ive me your money,” but Neel stated both times that he did not have any, and Davis exited the house through the front door. Id. at 214. Brown called 911 and reported the shooting. Homicide Detective Jose Torres of the Indianapolis Metropolitan Police Department responded to the 911 call. Nolan died as result of the gunshot wound to his neck.

On January 20, 2009, the State charged Davis with: Count I, murder; Count II, felony murder; Count III, the robbery of Nolan as a class A felony; Count IV, the robbery of Brown as a class B felony; Count V, the attempted robbery of Neel as a class B felony; and Count VI, carrying a handgun without a license as a class A misdemeanor. Witness testimony at Davis’s jury trial identified Davis as the person who shot Nolan. On December 1, 2009, the jury found Davis guilty as charged. On December 10, 2009, the trial court vacated Davis’s conviction for felony murder under Count II and entered judgment and sentences for the convictions under Counts III, IV, and V as class C

felonies. The trial court sentenced Davis to sixty years on Count I for murder, six years on Count III for robbery as a class C felony, six years on Count IV for robbery as a class C felony, six years on Count V for attempted robbery, and one year on Count VI for carrying a handgun without a license. The court ordered Davis's sentences to be served consecutive to each other, with the exception that his sentence under Count VI be served concurrent with Count V. Thus, Davis received an aggregate sentence of seventy-eight years, all of which was to be executed.

The sole issue is whether the evidence is sufficient to sustain Davis's convictions. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

Davis argues that “[t]here was insufficient evidence of identity to sustain [his] convictions beyond a reasonable doubt” and asserts that Brown “was intoxicated on alcohol and crack cocaine” at the time of the shooting and that “[t]he evidence tying [Davis] to the [m]urder and [r]obberies was the word of one young man who had been intoxicated and distraught during the incident.” Appellant's Brief at 8. Davis further argues that “[t]he weapon was found in [Lewis's] apartment,” that fingerprints could not be recovered, and that DNA evidence was inconclusive. Id. He states that the “stories of

the men were divergent” because Neel “denied crack use, but [Brown] had him smoking” and “Neel saw one man, but [Brown] saw [Lewis], the person he knew and the drug dealer, come sell product, and leave without [Neel] witnessing any of the interaction.” Id. at 10. Davis also argues that “[s]ome of [Neel’s] testimony and recollection, while more coherent than his friend’s, appeared minimized or selective, impacting the reliability of his testimony.” Id. at 11. Davis essentially challenges the testimony at trial identifying him as the person who committed the crimes for which he was charged.

Identification testimony need not necessarily be unequivocal to sustain a conviction. Heeter v. State, 661 N.E.2d 612, 616 (Ind. Ct. App. 1996). Elements of offenses and identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990). The unequivocal identification of the defendant by a witness in court, despite discrepancies between his description of the perpetrator and the appearance of the defendant, is sufficient to support a conviction. Emerson v. State, 724 N.E.2d 605, 610 (Ind. 2000), reh’g denied. Inconsistencies in identification testimony impact only the weight of that testimony, because it is the jury’s task to weigh the evidence and determine the credibility of the witnesses. Gleaves v. State, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007) (citing Badelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001), trans. denied). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a

conviction. Id. Rather, we examine the evidence and the reasonable inferences therefrom that support the verdict. Id.

Here, the record reveals that the jury was presented with evidence regarding the identification of Davis. Detective Torres testified that police obtained a description of Lewis from Brown and a description of Davis from Neel. Police were also given Lewis's nickname, the phone number which Brown used to contact Lewis prior to the shooting, and a description of the vehicle Lewis was driving on the night of the shooting. Using the information they received from Brown and Neel, Detective Torres and other officers apprehended Lewis, and the gun that was used to shoot Nolan was later discovered inside Lewis's apartment.

Detective Torres further testified that, after Lewis was in custody, he met with Brown and showed him a lineup, and Brown "identified David Lewis as being the Black that . . . was there that evening of this incident and the person [from whom he had] purchased narcotics." Transcript at 288. Also, while Lewis was in jail, Detective Torres "began listening to jail phone calls between [Lewis] and [his girlfriend]," who still lived at Lewis's apartment. Id. at 289. Torres testified: "While listening to the phone calls, I had heard repeatedly questions about a person known as Twink," and further testified that another detective informed him that Davis, who at the time was involved in the other detective's cases as a witness, went by the name of Twink. Id. at 290. Based upon this information, on December 16, 2008, Detective Torres "created a photo lineup, an array,

with Justin Davis in . . . the lineup,” and Neel “identified the person who shot Michael Nolan to be Justin Davis.” Id. at 292.

Neel testified during direct examination that just prior to the shooting he was sitting in a chair which was approximately three feet from where Davis was sitting on the edge of the love seat. Neel also testified that he saw that Davis was “[r]ight on [him],” that he “seen his face” and knew “who he was,” and that Davis was “speaking to [him]” and “[he] spoke back to [Davis].” Id. at 215. Neel testified that, about eleven days after the shooting, when Detective Torres presented him with a sheet containing photographs, Neel “saw the [shooter] right off the bat.” Id. at 224. When presented with State’s Exhibit No. 63 at trial, Neel testified that he recognized the exhibit as the lineup and that he had “circled Number 2” to identify Davis. Id. Neel testified that he recognized Davis’s “facial features.” Id.

During his direct testimony, Brown verified a photo identification that he had made of Lewis a couple of days after the incident. When Brown was asked “[a]nd was that the person who shot [Nolan],” Brown testified: “No, that’s not the one that – it’s the guy that was with [Lewis] that shot [Nolan].” Id. at 98. Also, records for Lewis’s cell phone for the period of December 1, 2008 through December 20, 2008, and for the period of 11:45 a.m. on December 4, 2008 through 9:51 a.m. on December 5, 2008, were admitted into evidence. Evidence was presented to the jury that the records show that Nolan and Brown had made repeated attempts to contact Lewis as described by the

testimony of Brown and Neel and that there was interaction between Davis's cell phone and Lewis's cell phone.

We cannot say that it was unreasonable for a jury to believe the identification testimony of Neel, who was physically near to Davis and observed Davis's facial features and testified to observing Davis shoot Nolan, and the testimony of Detective Torres regarding the police investigation of the shooting and subsequent identification of Davis. See Emerson, 724 N.E.2d at 610 (holding it was reasonable for a jury to believe the testimony of two of three witnesses who positively identified the defendant).

To the extent that Davis points to inconsistencies between the testimony of Neel and Brown regarding whether Neel had also been using crack cocaine or other events during the night of the crimes, we note that any discrepancies in the witnesses' testimony "were factual issues for the jury to resolve" in deciding the weight and credibility to assign those witnesses' testimony. Gleaves, 859 N.E.2d at 771 (citing Miller v. State, 770 N.E.2d 763, 775 (Ind. 2002)). Testimony was elicited from the witnesses upon which the jury could rely to determine their credibility. Davis's arguments regarding why Neel should not be believed amount to an invitation that we reweigh the evidence, which we cannot do. See Jordan, 656 N.E.2d at 817.

Further, we note that the jury heard the testimony of Neel and Brown with respect to the person who shot Nolan. Brown testified that, after Lewis and Davis arrived at Brown's house, he purchased cocaine from Lewis while Nolan showed Davis a gun that Nolan desired to sell. Neel testified that he had gone to the restroom, which was located

in Brown's bedroom, and then cut through the dining room to the kitchen to "make another drink." Transcript at 203. When Neel returned to the front room where Brown and Nolan were sitting, he observed Davis sitting on the edge of the love seat. Brown had testified that Lewis had stayed in the house for "[m]aybe five minutes" and that, almost immediately after leaving with Lewis, Davis had walked back inside through the front door. Brown testified that Davis "just got up off the arm of the . . . love seat [and] shot [Nolan]," *id.* at 92-93, and Neel testified that at a moment when Nolan had a "pipe up to his mouth" and "was using drugs," Davis got up and shot Nolan. *Id.* at 213.

Finally, to the extent that Davis argues that Brown and Neel were intoxicated, we note that the jury heard testimony regarding the extent of those witness's intoxication on the night of the shooting. Detective Torres testified that Brown appeared intoxicated "from alcohol" and "from possibly crack cocaine," that Neel "just seemed like he was intoxicated with alcohol," and that Neel "was more coherent" and able to talk to him. *Id.* at 278-280. The jury was able to assess the testimony of Detective Torres, Brown, and Neel and determine their credibility.

Based upon our review of the record, we conclude that evidence of probative value exists from which the jury could have found that Davis committed the charged offenses. See Emerson, 724 N.E.2d at 610 (holding that evidence was sufficient to support the defendant's convictions for murder, robbery, and carrying a handgun without a license among other crimes where the State's witnesses testified that the defendant was the person who committed the crimes); Wilder v. State, 716 N.E.2d 403, 405 (Ind. 1999)

(holding that the evidence was sufficient to support the defendant's convictions for robbery and felony murder where witnesses made in-court identifications of the defendant and had ample opportunity to view the defendant at the time of the crimes).

For the foregoing reasons, we affirm Davis's convictions for murder, two counts of robbery as class C felonies, attempted robbery as a class C felony, and carrying a handgun without a license as a class A misdemeanor.

Affirmed.

DARDEN, J., and BRADFORD, J., concur.