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FILED
Aug 17 2009, 9:08 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

SAMUEL V. FANCHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0901-CR-35
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 1
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0805-MR-107656

August 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Samuel V. Fancher (Fancher), appeals his convictions for murder, a felony, Ind. Code § 35-42-1-1; attempted murder, a Class A felony, I.C. §§ 35-42-1-1, 35-41-5-1; criminal confinement as a Class B felony, I.C. § 35-42-3-3; and carrying a handgun without a license as a Class A misdemeanor, I.C. §§ 35-47-2-1, -23.

We affirm.

ISSUE

Fancher presents four issues for our review, which we restate as the following single issue: Whether the State presented sufficient evidence to support Fancher's convictions.

FACTS AND PROCEDURAL HISTORY

The evidence most favorable to Fancher's convictions is as follows. On July 30, 2007, seventeen-year-old Leroy Moorman (Moorman) was driving in Indianapolis, Indiana, with his friend, Ryan Sampson (Sampson). As they left a gas station, Moorman noticed a white Ford Crown Victoria pulling into the station. While returning to Moorman's home on Dearborn Street, the boys encountered a second white Ford Crown Victoria, this one with custom rims. The driver pulled alongside Moorman's vehicle and asked him if he wanted to sell it. Moorman said that he did and then continued to the alley behind his house. The second Crown Victoria pulled in behind him. As Sampson and Moorman exited their vehicle, some men from the second Crown Victoria approached them with guns. Moorman was hit on the head and fell down, while Sampson fought with the men. Sampson and

Moorman were eventually forced into the back seat of the second Crown Victoria at gunpoint and driven away.

Moorman's younger brother was in the house when the cars pulled into the alley. He heard the cars and looked out a window. He saw Moorman's car and a white car "with rims." (Transcript p. 56). He heard one of the men say, "I heard y'all broke in my house[.]" (Tr. p. 55). He went outside and saw one of the men standing over his brother. He then went back to the house and told his aunt what was going on, and she called the police.

As the second Crown Victoria drove away from the house, Moorman and Sampson began asking questions about why they were forced into the car. The men's responses gave Moorman the "general feeling . . . that [they] were being accused of something." (Tr. p. 107). The Crown Victoria stopped at an abandoned house on Gale Street. Moorman and Sampson were led into the house at gunpoint and then directed into a bathroom. Moorman and Sampson were asked where "certain items" were. (Tr. p. 83). Moorman and Sampson were then shot. Moorman survived after being shot in both arms and playing dead, but Sampson was killed by several gunshots, including two to the back of the head that were "instantly fatal." (Tr. p. 148). Police later recovered parts of five bullets, all which were in the .38 caliber class.

Indianapolis Metropolitan Police Department (IMPD) Officer Kerry Morse (Officer Morse) was dispatched to the Dearborn Street house on a report of a "[p]ossible abduction." (Tr. p. 29). He was given a description of a white Ford Crown Victoria "with custom wheels." (Tr. p. 32). Officer Morse "put out a broadcast" giving the description of that car.

(Tr. p. 33). While Officer Morse was at the Dearborn Street house, he learned that a shooting had occurred on Gale Street. On his way to Gale Street, Officer Morse saw a white Crown Victoria and pulled it over. Tia Griffin (Griffin), the mother of Fancher's son, was driving the car. Officer Morse questioned Griffin, then released her.

Meanwhile, IMPD Officer Bryan Sosbe (Officer Sosbe) saw a vehicle matching the description given by Officer Morse and pulled it over. Derrick Williams, who Moorman later identified in a photo array as one of the men involved in the abduction, was driving the car. Moorman's younger brother was brought to the scene and said that the vehicle "looked like the car" that had been behind his house. (Tr. p. 59). As such, Officer Sosbe had the car towed and impounded.

During the ensuing investigation, police found the fingerprints of Fancher, Jerry Emerson (Emerson), and Moorman's younger brother on the impounded car. The car was registered to Kara Black, with whom Emerson has several children. Emerson's fingerprints were also found on Moorman's car. In addition, IMPD Detective Tom Tudor (Detective Tudor) showed Moorman several photo arrays and asked him if he recognized any of the men involved in the abduction and shootings. Moorman identified Fancher and Emerson as the men who had been in the bathroom when Moorman and Sampson were shot.

Timothy Spears (Spears), a firearm examiner with the Indianapolis-Marion County Forensic Services Agency, examined the bullet fragments that were recovered from the Gale Street house. He determined that two of the bullets were fired from one .38 caliber gun and that two others were also fired from one .38 caliber gun. However, Spears could not

determine whether all four were fired from the same gun. The fifth bullet was also in the .38 caliber class, but it "did not have enough individual characteristics" for Spears to determine whether it had been fired from the same gun as any of the other bullets. (Tr. p. 242).

In March of 2008, police investigating a separate matter obtained a search warrant for a Bloomington, Indiana, motel room occupied by Fancher and Coy Daniels (Daniels). One day, shortly after seeing Fancher leave the motel, officers moved in and executed the warrant while Daniels was alone in the room. The officers found a .38 caliber handgun. Spears examined the gun and observed that "in the barrel area there was some marks that didn't appear to be consistent with rifling marks that ran perpendicular to what - - the rifling rounds." (Tr. p. 244). Spears opined that the marks could have been made intentionally by using a tool. Spears was unable to determine whether the gun recovered from the motel room had fired any of the bullets found after Sampson and Moorman were shot. According to Spears, "it's possible" that the marks inside the gun could affect one's "ability to make an identification on the bullets[.]" (Tr. p. 247).

Also in early 2008, police began talking with Curtis Williams (Williams), Sampson's cousin. Williams claimed to have information on the shootings. Williams was in federal custody on a drug charge for which he faced a sentence of ten years to life. In exchange for a plea agreement limiting his sentence to ten years, Williams agreed to provide, among other things, the information he had regarding the shootings of Moorman and Sampson.

According to Williams, both Fancher and Emerson drove white Ford Crown Victorias. One day in the summer of 2007, Williams saw the Crown Victorias, one behind the other,

while at a friend's house. Griffin was driving the first Crown Victoria with Emerson in the passenger seat. Emerson told Williams that he "needed to holler at [Williams] . . . when he's done handling somethin'." (Tr. p. 190). Because Williams knew that Griffin was Fancher's girlfriend, he asked where Fancher was. Fancher then leaned up from the back seat and said, "[W]hat's up?" (Tr. p. 191). Williams could see that there were two other males in the back seat of the car, and he heard "screaming" and "commotion" in the back seat and saw that the car was shaking. (Tr. pp. 192, 219). When Williams asked about the commotion, Emerson tapped Griffin on the leg, and Griffin drove away.

Shortly after his encounter with Fancher and Emerson, Williams heard from family members that Sampson had been killed. Later, Williams was driving and saw Fancher and Emerson, and he pulled over to talk to them. Williams said, "I heard somebody broke in yall trap[1]." (Tr. pp. 195-96). Fancher responded that "some little dudes did it." (Tr. p. 196). According to Williams, the conversation proceeded as follows:

> [Emerson] said cuz, n****, we seen them on camera. He said one of them little n***** even had the nerve to try to fight. He said as soon as we got that n**** in - - in the house, we hit that n**** down on the top of the head, and he said [Fancher] was goin' to do the same thing - - he said this b**** goin' to do the same thing, he goin' to get him up for the body shot.
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> He said he hit the n**** in the head and he said [Fancher] was supposed to get the other one in the head. He said this b**** want to get him up for the body shot. I told him body shots didn't work. [Fancher] said, b****, you seen him laying there. You thought he was dead, too.

[1] A "trap," according to Williams, is a "crack house." (Tr. p. 196). The transcript from Emerson's trial used the word "track." *See Emerson v. State*, No. 49A02-0809-CR-848 (Ind. Ct. App. July 9, 2009). The Urban Dictionary's "Urban Word of the Day" for August 27, 2006, was "trap," which was defined as "[t]he area where drug deals are carried out." *See* http://www.urbandictionary.com/define.php?term=trap (last accessed July 28, 2009); *see also United States v. Miranda*, 248 F.3d 434, 438 (5th Cir. 2001), *reh'g denied*, *cert. denied*.

(Tr. pp. 198-99). At that point, Emerson "started back up" and said to Williams, "[W]hy you always askin' me questions?" (Tr. p. 199). "[A]fter the fact," Williams realized that Fancher and Emerson were talking about killing Sampson. (Tr. p. 201).

On May 12, 2008, the State filed an Information charging Fancher and Emerson with murder, a felony, I.C. § 35-42-1-1; attempted murder, a Class A felony, I.C. §§ 35-42-1-1, 35-41-5-1; criminal confinement as a Class B felony, I.C. § 35-42-3-3; and carrying a handgun without a license as a Class A misdemeanor, I.C. §§ 35-47-2-1, -23. Following a bench trial on November 10 and 12, 2008, the trial court found Fancher guilty as charged.[2] On the murder charge, the court found Fancher guilty "on the accomplice liability theory." (Tr. p. 285). On December 16, 2008, the trial court sentenced Fancher to eighty-five years in prison.

Fancher now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Fancher argues that the State failed to present sufficient evidence to support his convictions. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment.

[2] Emerson had a separate trial.

Id. at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*. Here, the State's case against Fancher was based almost entirely on circumstantial evidence. "A conviction may be based upon circumstantial evidence alone." *Id*.

I. *Murder*

Fancher first challenges the evidence supporting his conviction for murder. "A person who . . . knowingly or intentionally kills another human being . . . commits murder, a felony." I.C. § 35-42-1-1. Here, the trial court found Fancher guilty of murder "on the accomplice liability theory[.]" (Tr. p. 285). In Indiana, one may be charged as a principal yet convicted as an accomplice. *McQueen v. State*, 711 N.E.2d 503, 506 (Ind. 1999). "[T]here is no distinction between the criminal responsibility of a principal and that of an accomplice." *Id*.[3]

In order to find Fancher guilty as an accomplice, the trial court was required to find beyond a reasonable doubt that he knowingly or intentionally aided, induced, or caused another person to commit murder. I.C. § 35-41-2-4. The State presented several pieces of evidence tending to show that Fancher aided Emerson in killing Sampson. Police found Fancher's fingerprints on the vehicle that took Sampson away. Detective Tudor testified that Moorman was shown photo arrays and identified Fancher and Emerson as the men who had been in the bathroom with him and Sampson at the time of the shootings.

[3] For this reason, the fact that "[n]o one testified at trial that Fancher killed Sampson" is not determinative of Fancher's guilt. (Appellant's Br. p. 8).

Furthermore, several months after the shootings, police in Bloomington found a .38 caliber handgun in a motel room in which Fancher had been staying. The bullets found after Moorman and Sampson were shot were all fired from a .38 caliber gun. It is true that Spears, the firearm examiner, was unable to conclusively link the gun found in the motel room with the bullets recovered after the shootings. However, Spears did testify that there were marks in the barrel area of the gun, that the marks could have been made intentionally by using a tool, and that it is possible that the marks could affect one's ability to make an identification on the bullets. While this ballistics evidence by no means conclusively established Fancher's guilt, it is certainly relevant circumstantial evidence, and circumstantial evidence can support a conviction. *See Perez*, 872 N.E.2d at 213.

In addition, Williams testified regarding an incident during the summer of 2007 in which he encountered Fancher and Emerson in a white Crown Victoria with two other males. Williams heard "screaming" and "commotion" in the back seat and saw that the car was shaking. (Tr. pp. 192, 219). After learning that Sampson had been killed, Williams had a conversation with Fancher and Emerson in which Fancher and Emerson implicated themselves in the shootings of two "little dudes." (Tr. p. 196). Emerson said that "as soon as we got that n**** in – in the house, we hit that n**** down on the top of the head" and that "[Fancher] was goin' to do the same thing" to the other person but instead "[got] him up for the body shot." (Tr. pp. 198-99). Williams' testimony was consistent with the evidence that Sampson had been shot in the head and that Moorman had been shot in the arms.

With regard to Williams' testimony, Fancher has this to say in a footnote in his brief:

> This statement was inadmissible hearsay. See Ind. Evidence Rule 801 ("Hearsay is a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted." and Ind. Evidence Rule 80[2] ("Hearsay is not admissible except as provided by law [or] by these rules."). It is understandable that Fancher's trial counsel did not object to Williams' hearsay testimony, as nothing in it implicated Fancher in the shooting. To the extent Williams' hearsay statement could be construed as implicating Fancher, however, its admission would have subjected Fancher to fundamental error necessitating the reversal of his conviction despite the absence of an objection to the hearsay.

(Appellant's Br. p. 9 n.4). Fancher has not cited any authority in support of his fundamental error claim, so it is waived. *See* Ind. Appellate Rule 46(A)(8)(a).

Waiver notwithstanding, the trial court did not commit fundamental error by allowing Williams' testimony. Indiana Evidence Rule 801(d) provides, in part, that "[a] statement is not hearsay if: . . . (2) *Statement by party-opponent*. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth[.]" Williams testified that his conversation with Emerson and Fancher proceeded as follows:

> [Emerson] said cuz, n****, we seen them on camera. He said one of them little n***** even had the nerve to try to fight. He said as soon as we got that n**** in - - in the house, we hit that n**** down on the top of the head, and he said [Fancher] was goin' to do the same thing - - he said this b**** goin' to do the same thing, he goin' to get him up for the body shot.
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> He said he hit the n**** in the head and he said [Fancher] was supposed to get the other one in the head. He said this b**** want to get him up for the body shot. I told him body shots didn't work. [Fancher] said, b****, you seen him laying there. You thought he was dead, too.

(Tr. pp. 198-99). Fancher's statement—"[B]****, you seen him laying there. You thought he was dead, too."—satisfies both 801(d)(2)(A) and (B). As to 801(d)(2)(A), this was

Fancher's own statement. More importantly, with regard to 801(d)(2)(A), Fancher's statement manifested an adoption of Emerson's statements.

Finally, we acknowledge that there is reason to question Williams' credibility. He testified against Fancher in exchange for a plea agreement that limited a potential life sentence to ten years. But it is the trier of fact, not this court, that judges the credibility of witnesses. *Perez*, 872 N.E.2d at 213. The trial court was able to observe Williams and listen to his testimony, and it found Fancher guilty.

Taken together, the evidence presented by the State provided a sufficient basis upon which the trial court could find Fancher guilty of murder beyond a reasonable doubt.

II. *Attempted Murder*

Fancher also challenges the sufficiency of the evidence supporting his conviction for the attempted murder of Moorman. In a footnote, Fancher suggests that "[t]he trial court found *sua sponte* that Fancher was guilty of Attempted Murder under the accomplice liability." (Appellant's Br. p. 10 n.5). This is not true. The trial court only found Fancher guilty of the *murder* charge "on the accomplice liability theory." (Tr. p. 285). This error notwithstanding, the substance of Fancher's argument is more general.

First, he argues that "Moorman never identified Fancher or Emerson as the individuals involved in any of the events he described, including the shooting." (Appellant's Br. p. 10). This, again, is false. As noted above, Detective Tudor testified that Moorman viewed photo arrays and identified Fancher and Emerson as the men who had been in the bathroom when Moorman and Sampson were shot. Fancher also contends that "Williams' hearsay statement

did not sufficiently implicate Fancher or Emerson in the shooting" and that "the State's ballistics expert was unable to link the [g]un to the shooting." (Appellant's Br. pp. 10-11). Fancher acknowledges that these are the same arguments he made with regard to his murder conviction. We rejected those arguments above, so we need not revisit them.

III. *Criminal Confinement*

Next, Fancher argues that the State failed to present sufficient evidence to support his conviction for criminal confinement. "A person who knowingly or intentionally . . . confines another person without the other person's consent . . . commits criminal confinement." I.C. § 35-42-3-3(a)(1). The offense is a Class B felony if "committed while armed with a deadly weapon[.]" *Id*. at (b)(2)(A). Here, the State's charging information alleged that Fancher and Emerson "did knowingly, while armed with a deadly weapon, that is: a handgun, confine Ryan Sampson and/or Leroy Moorman, without the consent of Ryan Sampson and/or Leroy Moorman, by confining them in the bathroom at 2519 N. Gale[.]" (Appellant's App. p. 26).

Fancher's argument with regard to this conviction is brief:

> There was simply no evidence that Fancher confined Sampson or Moorman in the bathroom of the Abandoned Home at gunpoint or otherwise. No one testified that Fancher was in the Abandoned Home with Sampson or Moorman. And no one testified that Fancher confined Sampson or Moorman in the Abandoned Home's bathroom or anywhere else.

(Appellant's Br. p. 11). He is wrong. As for the contention that "[n]o one testified that Fancher was in the Abandoned Home with Sampson or Moorman," we once again direct Fancher to Detective Tudor's testimony that Moorman viewed photo arrays and identified

Fancher and Emerson as the men who were in the bathroom when Moorman and Sampson were shot.

With regard to Fancher's claim that there is no evidence that Fancher confined Sampson or Moorman "at gunpoint or otherwise" in the "bathroom or anywhere else," we note that Moorman testified that he and Sampson were led into the Gale Street house and forced into the bathroom at gunpoint. Specifically, Moorman testified as follows:

> Q: When you get to that house, do you go inside?
> A: Yes.
> Q: Why?
> A: Had to.
> Q: You had to?
> A: Yes.
> Q: Because of the guns?
> A: Yeah.
>
> * * * *
>
> Q: Once you get inside the house, where do you go?
> A: To the bathroom through the living room.

(Tr. pp. 82-83). This evidence was sufficient for the trial court to find beyond a reasonable doubt that Fancher and Emerson confined Moorman and Sampson at gunpoint in the bathroom of the Gale Street house.

IV. *Carrying a Handgun Without a License*

Finally, Fancher challenges his misdemeanor conviction for carrying a handgun without a license. With certain exceptions not relevant here, "a person shall not carry a handgun in any vehicle or on or about the person's body, except in the person's dwelling, on the person's property or fixed place of business, without a license issued under this chapter

being in the person's possession." I.C. § 35-47-2-1. The State charged that Fancher did so "on or about July 30, 2007[.]" (Appellant's App. p. 26).

Fancher does not argue that he had a license or that he was in his dwelling or on his property or fixed place of business. Rather, he contends that the State failed to present any evidence tending to show that he carried a handgun on July 30, 2007. We disagree. Moorman testified that he and Sampson were forced into the bathroom of the Gale Street house at gunpoint, and he identified Fancher as one of the two men who were in the bathroom with Moorman and Sampson at the time of the shootings. Furthermore, Williams testified that Fancher acknowledged having done some of the shooting. Specifically, after Emerson stated that "he hit the n**** in the head," he said that Fancher "was supposed to get *the other one* in the head." (Tr. p. 198-99 (emphasis added)). But, Emerson said, Fancher "want to get him up for the body shot." (Tr. p. 199). Emerson then said that he told Fancher that "body shots didn't work." (Tr. p. 199). Fancher jumped in, stating, "[B]****, you seen him laying there. You thought he was dead, too." (Tr. p. 199). Emerson and Fancher's story that Fancher gave one of the victims "body shots" is consistent with Moorman having been shot on both arms.

In addition to Williams' testimony, there is evidence that the gun found in the Bloomington motel room occupied by Fancher and Daniels was of the same caliber, .38, as the gun or guns used to kill Sampson and shoot Moorman. We recognize that the presence of a handgun in Fancher's motel room more than seven months after the shootings does not, standing alone, establish that Fancher carried a handgun on the day of the shootings,

especially since the firearm examiner was unable to link the gun to the bullet fragments found after the shootings. However, this evidence, along with the evidence that the recovered gun had marks in its barrel that could disguise any link to bullets fired from the gun, at least circumstantially suggests Fancher's guilt.[4]

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to support all four of Fancher's convictions.

Affirmed.

BAKER, C.J., and FRIEDLANDER, concur.

[4] Fancher emphasizes that there is no evidence that he possessed the handgun in the Bloomington motel room, noting that Daniels was in the room alone when police executed the search warrant. Nonetheless, the presence of a .38 caliber handgun in the motel room in which Fancher had been staying is circumstantial evidence, albeit of marginal probative value, that Fancher carried a handgun on the day on which Moorman and Sampson were shot by .38 caliber bullets.