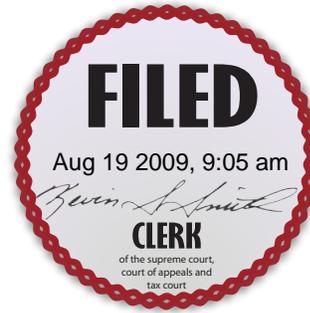


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

MICHAEL C. BORSCHEL
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ANGELA N. SANCHEZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DERICK SCRUGGS,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-0812-CR-1089
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0707-MR-132866

August 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Derick Scruggs appeals his conviction, after a bench trial, of felony murder.

We affirm.

ISSUE

Whether sufficient evidence supports the conviction.

FACTS

At approximately 11:00 a.m. on December 18, 2006, James Powell was parked in his King Ranch Ford truck (“the Truck”) on an Indianapolis street when a vehicle with three men inside pulled behind him, and two of the men approached the Truck. One man went to the driver’s side, pointed a handgun at Powell, demanded his money, pulled him from the Truck, and threw him to the ground. Scruggs entered the Truck and drove it away.

Scruggs and three other men – Brandon Lee, Octavius Clay (who is Scruggs’ younger cousin), and Charles Miller – rode around in the Truck the rest of the day. At some point during the evening, Lee got out of the Truck and walked down the street; two gunshots were heard, and Lee came running back with a pair of yellow Air Jordan shoes and a shirt. Scruggs testified that he “asked [Lee] what did he do,” and Lee answered that he “had to have them Jordan’s”; Scruggs then asked, “what you shooting for,” and Lee answered, “‘cause I’m trigger happy.” (Ex. 5, 6 at 13).

The next morning, Scruggs was driving the Truck; Lee, Clay, Miller, and Devron Sales were passengers. They rode around listening to music, and all but Sales smoked marijuana. At approximately 11:00 a.m., at Lee’s suggestion, Scruggs drove the Truck

into an apartment complex on the south side of Indianapolis and drove around several streets. Scruggs said “he wanted to get a car,” and when he saw a Mercedes Benz, “[Scruggs] said the Mercedes was nice and that he wanted it.” (Tr. 171, 176). The car was parked in front of an apartment with its door ajar.

Scruggs parked the truck, all five men got out and went to the side of the building by some bushes. Scruggs “said he wanted to get the man’s keys,” and Lee said, “All right, let’s get him.” (Tr. 178). Scruggs, Lee, and Clay each carried a handgun, and Miller carried a shotgun, and “all of” the weapons were “drawn” as they approached the apartment. (Tr. 181). Lee and Miller entered the apartment, with Clay and Scruggs close behind on the porch and Sales at the building corner as a look-out.

Witnesses heard yelling and gunshots. William Harris, the occupant of the apartment and owner of the Mercedes, was shot three times.

All five men ran to the Truck; Scruggs screamed, “Go, go, go,” and Clay drove them away. (Tr. 187). Miller “said the man had tried to grab the shotgun,” and “he told [Lee] to help him,” and Lee “just shot him.” (Tr. 187). They eluded a brief police pursuit and abandoned the Truck near Scruggs’ residence. All five men ran to Scruggs’ residence, where he gave his brother \$10 and told him to “get [Miller, Lee and Sales] away from here. Them boys is hot.” (Ex. 5, 6 at 17).

William Harris died from his wounds. Forensic evidence established that a .22 caliber handgun and a shotgun had been fired in the area inside Harris’ front door. The abandoned Truck was found to contain a pair of yellow Air Jordans, a cell phone connected to Scruggs, and a beverage container in the front seat console with Scruggs’

fingerprints on it. On July 10, 2007, the State charged Scruggs with murder during the course of the robbery or attempted robbery of Harris.¹ Scruggs waived jury trial and was tried to the bench on October 16, 2008.

Sales, age eighteen at the time of the trial, testified that in 2007 he had been arrested and jailed for the first time in his life – charged with the felony murder of Harris. He testified that he gave a voluntary statement without any deal from the State and subsequently he entered into a plea agreement. He agreed to plead guilty to conspiracy to commit robbery, an A felony, and to testify against his co-defendants. The State agreed to an open sentence whereby Sales faced a potential sentence of twenty to fifty years in prison, with the possibility of the sentence being suspended. Sales testified that it was Scruggs who drove the Truck into the apartment complex and announced his desire to get a car; that Scruggs saw a Mercedes parked in the complex and said he wanted that car and the keys; whereupon Lee agreed to help, and four of the men drew their weapons and approached Harris’ apartment.

Jerry Smith testified that on December 19th, he observed four men near the Truck, parked at the apartment complex, and one man “standing at the corner” of the building “looking around” it. (Tr. 17). He further testified that after briefly visiting inside the building, he came out and the four men were not there; that he had heard gunshots from what “sounded like different guns,” and within seconds, all five men ran to and got into the Truck, which sped off. (Tr. 10). Smith testified that he was only “seventy percent”

¹ Lee, Miller, Clay, and Sales were charged with the same offense as Scruggs. On February 29, 2008, the trial court granted the State’s motion to sever Scruggs’ case from those of his codefendants.

sure that Scruggs was one of the men, but he was “confident” that the man at the corner of the building was Sales. (Tr.15, 18).

Scruggs testified that on December 19th, Clay was driving the Truck (with the other four men as passengers) when Lee directed him to the apartment complex where Lee was to make a drug deal. He testified that Lee told Clay where to park the Truck, and then Lee and Miller exited the Truck and walked away – unarmed, as far as he knew. He testified that Clay and Sales then went to the side of the building and relieved themselves, and he stood behind the Truck while making a cell phone call; and after gunshots rang out, all ran back to the Truck. He also testified that at all times he was in the Truck, he was a back seat passenger. He testified that he was not present when the Truck was stolen but that he did ride inside it from “[a]round 11:00” a.m. until the night of December 18th. (Tr. 234). He further testified that he was older than Lee, Clay, Miller, and Sales,² and that he considered himself “a leader.” (Tr. 244).

The trial court took into consideration Scruggs’ argument that Sales testified for the State to “get. . . a break” and his testimony should not be believed before rendering a verdict. (Tr. 295). However, the trial court noted that Sales “admits to being a lookout, admits to committing a Class A felony offense,” and stated that “if Mr. Scruggs is telling the truth, then Devron Sales has absolutely no criminal liability whatsoever.” *Id.* It then found Scruggs guilty of felony murder.

DECISION

² Sales testified that at the time of trial (October 16, 2008), he was eighteen; Lee was “nineteen or twenty” (Tr. 163); that Miller was also eighteen; and Clay was nineteen.

When reviewing the sufficiency of the evidence to support the 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 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 an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

I.

Indiana's accomplice liability statute provides that 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. A person who knowingly or intentionally engages in conduct that constitutes a substantial step toward taking property from another person by using or threatening the use of force commits attempted robbery. I.C. §§ 35-42-5-1 and 35-42-5-1. Further, a person who "kills another person while committing or attempting to commit . . . robbery . . . commits murder, a felony." I.C. § 35-42-1-1.

Scruggs cites to the "factors considered by the fact-finder to determine whether a defendant aided another in the commission of a crime," as enumerated in *Wieland v. State*, 736 N.E.2d 1198 (Ind. 2000), as follows:

- (1) presence at the scene of the crime;
- (2) companionship with another engaged in a crime;
- (3) failure to oppose the commission of the crime; and
- (4) the course of conduct before, during, and after the occurrence of the crime.

Id. at 1202. Scruggs argues that proper application of the factors herein to this case will not support his conviction. We disagree.

As to the first factor, his presence at the scene of the crime, he reminds us that he was “not in the apartment of” the victim. Scruggs’ Br. at 9. His assertion overlooks the evidence that when Lee and Miller entered through the door, he was close behind them on the porch with his handgun drawn. Hence, a reasonable inference may be drawn that had there not been an immediate confrontation just inside the door,³ Scruggs would have entered.

On the second factor, his companionship with another engaged in a crime, he reminds us that he first met Lee and Miller on December 18th⁴ and Sales on December 19th, and that Sales had testified that the other four were “childhood friends.” *Id.* As the trial court noted, Scruggs’ own testimony indicated that in the evening of December 18th, Scruggs was with Lee, Miller, and Clay when Lee left the Truck, gunshots were heard, and Lee ran back to the Truck with Air Jordan shoes and a shirt; and that Scruggs questioned Lee about what he had done and Lee told him that he had to have the shoes and he was trigger happy. Nevertheless, Scruggs was willing to continue his association with Lee on the fateful following date -- December 19th.

Next, as to the third factor, his failure to oppose the commission of the crime, Scruggs reminds us that he testified that he thought Lee and Miller went to the apartment

³ A diagram of the apartment layout and photographs of shotgun damage and shell casings were entered into evidence.

⁴ Scruggs testified that he first met Lee and Miller when they picked him up in the Truck “around 11:00” a.m. on December 18th. (Tr. 238). Yet, Powell testified that the armed taking of the Truck occurred at 11:00 a.m. on December 18th.

to make a drug deal. However, he appears to ignore the fact that the trial court heard testimony that it was Scruggs who drove the Truck into the apartment complex; stated his desire for a car; specified wanting a particular Mercedes parked in front of an apartment with its door ajar; stated that he “wanted to get the man’s keys,” and did not object when Lee responded, “All right, let’s get him,” (Tr. 178); and then, with a drawn deadly weapon, approached the apartment with other men.

Finally, we turn to the fourth factor -- his conduct before, during, and after the occurrence of the crime. Scruggs concedes that the evidence concerning the “Air Jordan incident” on December 18th established that he “knew that Lee had a gun,” but argues that he “did not know he was capable of shooting another person.” Scruggs’ Br. at 12. As the trial court properly noted, Scruggs’ testimony supported the reasonable inference that Lee had the propensity to be violent as Scruggs had been aware that Lee fired his gun in the course of a robbery to acquire the shoes and shirt. “[A]ccomplice liability applies to the contemplated offense and all acts that are a probable and natural consequence of the concerted action.” *Wieland*, 736 N.E.2d at 1202. Scruggs acted in concert when having drawn his own deadly weapon, he approached the apartment with Lee -- a violent person who had previously demonstrated his willingness to use a gun to commit a robbery. That Lee did use his deadly weapon in the course of the December 19th robbery was a probable and natural consequence of Lee’s behavior that Scruggs had set into motion.

To summarize, it was Scruggs who stated that he wanted a car and identified a Mercedes in front of Harris’ apartment as the car he wanted. Thus, Scruggs announced his intent to commit a felony – to take the car, which would require that he “get the man’s

keys” to the car. (Tr. 178). Thus, when he drew his deadly weapon and approached Harris’ apartment, he took a substantial step toward the knowing or intentional taking of the car and the keys by threat or use of force. This evidence is sufficient for a reasonable fact-finder to find that Scruggs committed the crime of felony murder.

II.

Scruggs further argues that we should reverse his conviction because “Mr. Sales’ testimony is inherently ‘incredibly dubious.’” Scruggs Br. at 13. Again we disagree.

As our Supreme Court explained in *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007), appellate courts may apply the “incredible dubiousity” rule to impinge upon the function of the fact-finding to judge the credibility of a witness.” It provided this rule as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant’s conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id.

Scruggs’ own testimony during trial established his prior association with his co-defendants and his presence at the scene of the crime, and confirmed many of the details testified to by Sales. Smith testified that Sales was apart from the other four men, at the corner of the building, and appeared to be “looking around” it -- testimony that supports the reasonable inference that Sales was acting as a lookout. (Tr. 18). Further, a drink

container bearing Scruggs' fingerprints was found in the front seat console of the Truck after it was abandoned -- consistent with Sales' testimony that Scruggs was driving the Truck when it entered the apartment complex on December 19th and contrary to Scruggs' testimony that he was not driving that morning and had only been a passenger in the back seat. The evidence also appears to support the State's argument to the trial court that although Scruggs had given a statement that Lee went in first and Miller was right behind him, he "couldn't have seen that" based upon where his trial testimony placed him at the time of the gunshots. (Tr. 290).⁵

There is not a "complete lack of circumstantial evidence," and Sales' testimony is not "so incredibly dubious or inherently improbable that no reasonable person could believe it." *Fajardo*, 859 N.E.2d at 1208. Scruggs' argument in that regard must fail.

Affirmed.

BAILEY, J., and ROBB, J., concur.

⁵ Sales and Scruggs, as well as several other witnesses, referred to exhibits depicting aerial views of the apartment complex during their testimony and identified the respective locations of the parked Truck, the Mercedes, Harris' apartment, and the corner of the apartment building -- from which Sales either peered around the corner as a lookout, or near where Sales and Clay were relieving themselves. However, because there are no markings on the exhibits to demonstrate the witnesses' testimony, we are unable to exactly correlate their testimony with the locations.