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IN THE COURT OF APPEALS OF INDIANA

LEROY N. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A04-1002-CR-79
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0806-FA-115

August 19, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Leroy N. Jones ("Jones") was convicted in Grant Superior Court of Class A felony murder, Class B felony conspiracy to commit arson, two counts of Class B felony arson, Class C felony battery by means of a deadly weapon, and Class D felony intimidation. Jones appeals and presents three issues, which we restate as:

I. Whether the State presented evidence sufficient to support Jones's conviction for attempted murder;

II. Whether the trial court erred in admitting evidence that the man Jones shot was a confidential informant who was scheduled to testify in Jones's trial for dealing in cocaine;

III. Whether the court erred in instructing the jury regarding the evidence that can establish the intent to kill required for attempted murder.

We affirm.

Facts and Procedural History

On November 20, 2006, the State charged Jones with dealing in cocaine. This charge resulted from a controlled buy in which the victim in this case, D.G., acted as a confidential informant for the police. Jones was released on bond on this charge on August 23, 2007.

In June of 2008, D.G. received a phone call and recognized the person on the other end of the line as Jones. Jones told D.G., "You got me. You know me. I'm gonna get you back." Tr. p. 133. Jones called D.G. another time and told him, "It's going to be a bloody summer. All these snitches are gonna die this summer." Tr. p. 134.

Craig Charles ("Charles"), who was a longtime friend of Jones, heard Jones threaten D.G.'s family by telling them, "Watch out. Your son ain't comin[g] t[o] court." Tr. p. 186. According to Charles, Jones said he wanted to prevent D.G. from testifying

against him in the cocaine trial "at all cost" and indicated that he wanted to kill D.G. Tr. pp. 198-99. Jones also loaded an AK-47 rifle while wearing a sock on his hand in order to leave no fingerprints on the ammunition.

On the night of June 16 and early morning hours of June 17, 2008, Charles, Jones, Brittany Sheets ("Sheets"), and Mike Hale ("Hale") discussed setting fire to several vehicles belonging to members of D.G.'s family. Jones came up with the idea of setting the fires, and Charles got gasoline to act as an accelerant. Sheets then drove Hale in her car, and Hale set fire to three vehicles at three different locations. The first fire was set to a vehicle where D.G.'s cousin lived, the second vehicle was burned where D.G.'s mother lived, and the last fire was set where another of D.G.'s cousins, J.G., lived.

The morning after the fires, D.G. and J.G. went to D.G.'s grandmother's house by obtaining a ride from a female acquaintance, T.J. En route, J.G. received a telephone call informing him that Charles was staying at his mother's house. J.G. therefore told T.J. to drive them to Charles's mother's house. When they arrived, D.G. saw Sheets' car parked in a nearby alley. J.G. saw Charles, jumped out of the car, and began shooting at Charles, who ran away.

As T.J. moved her car closer to the alley where Sheets' car was parked, D.G. saw Jones and Sheets sitting in the car. D.G. and Jones stared at each other for approximately fifteen seconds before Jones raised an AK-47 rifle and began shooting at D.G. T.J. screamed and drove away as bullets from the AK-47 struck her car. T.J. was struck by one bullet. D.G. was not as lucky; he was shot numerous times in his legs, arms,

abdomen, chest, and genitals. D.G. was taken to the hospital with life-threatening injuries, but survived.[1]

After the shooting, Charles spoke with Jones on the telephone, and Jones told Charles to tell the police that he, not Jones, was the passenger in Sheets' car. Charles, however, eventually informed the police that Jones was the shooter.

On June 24, 2008, the State charged Jones as follows: Count I, Class A felony attempted murder; Count II, Class C felony battery by means of a deadly weapon; Count III, Class B felony conspiracy to commit arson; Counts IV, V, and VI, Class B felony arson; and Count VII, Class D felony intimidation. A jury trial began on September 29, 2009. At the end of the State's case-in-chief, the State moved to dismiss Count VI, which the trial court granted. The jury found Jones guilty as charged on the remaining counts. At a sentencing hearing held on October 19, 2009, the trial court sentenced Jones to an aggregate sentence of seventy years. Jones now appeals.

I. Sufficiency of the Evidence

Jones first claims that the State presented insufficient evidence to support his conviction for attempted murder. Upon a challenge to the sufficiency of evidence to support a conviction, we neither reweigh the evidence or judge the credibility of the witnesses; instead, we respect the exclusive province of the trier of fact to weigh any conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider

[1] The Statement of Facts contained in an Appellant's Brief "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed." Ind. Appellate Rule 46(A)(6)(b). Contrary to this rule, the Statement of Facts in Jones's brief relates the facts favorable to his claim of insufficient evidence, not the jury's verdict, and completely omits the fact that D.G. was shot and identified Jones as the shooter.

only the probative evidence and reasonable inferences supporting the verdict, and we will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Jones acknowledges this standard, but argues that we should nevertheless reverse his conviction based upon the "incredible dubiosity" rule. Jones claims that D.G. was "far from a disinterested witness," because he had worked as a confidential informant and therefore "had a motive to implicate Jones so as to please his police masters." Appellant's Br. p. 6. Jones also notes that D.G.'s testimony implicating Jones was contradicted by other witnesses, including Sheets, who claimed that Jones was not in her car at all on the day of the shooting. Jones also notes that there was no physical evidence, e.g., fingerprints or DNA, etc., linking him to the crime. Thus, Jones argues that "because [D.G.]'s testimony is the only evidence that Jones was the shooter and it is totally uncorroborated and directly conflicts with other witnesses, this Court should apply the doctrine of incredible dubiosity and reverse the conviction for Attempted Murder." Id. at 7.

This is not the standard for application of the incredible dubiosity rule. We will overturn a conviction based upon the "incredible dubiosity" rule only when the testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. Baumgartner v. State, 891 N.E.2d 1131, 1138 (Ind. Ct. App. 2008). Application of the "incredible dubiosity" rule is further limited to those situations where a sole witness presents inherently contradictory

testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. Id.

Jones argues that D.G. was the only witness to the actual shooting and that therefore the incredible dubiosity rule is applicable. But even if we were to assume for the sake of argument that D.G. was the sole witness, the incredible dubiosity rule would still be inapplicable. There is nothing in D.G.'s testimony that is so inherently improbable that it ran counter to human experience and no reasonable person could believe it. His testimony simply contradicted and conflicted with the testimony of other witnesses. Any bias or inconsistencies in D.G.'s testimony was for the jury to consider, and we will not disturb its verdict.

The facts most favorable to the jury's verdict reveal that D.G. saw Jones sitting in Sheets' car. Jones and D.G. stared at each other for a several seconds before Jones raised an AK-47 rifle and started shooting at D.G., who was shot numerous times and sustained life-threatening injuries. From this, the jury could reasonably conclude that Jones, acting with the specific intent to kill D.G., took a substantial step toward killing D.G. See Ind. Code § 35-42-1-1(1) (2004); Ind. Code § 35-41-5-1 (2004); Tiller v. State, 896 N.E.2d 537, 541 (Ind. Ct. App. 2008) (conviction for attempted murder requires proof of specific intent to kill); Booker v. State, 741 N.E.2d 748, 756 (Ind. Ct. App. 2000) (evidence sufficient to establish that defendant acted with specific intent to kill victim where defendant pointed gun at victim's neck, threatened the victim, and shot victim point-blank).

II. Evidence Rule 404(b)

Jones next claims that the trial court erred in admitting evidence that D.G. had acted as a confidential informant and that D.G. was scheduled to testify against Jones in an upcoming trial in which Jones was charged with dealing in cocaine. In reviewing this claim, we note that the admission of evidence is within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of that discretion. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2008), trans. denied.

Indiana Evidence Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes, such as proof of motive*, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(emphasis added). Evidence Rule 404(b) was designed to assure that the State, relying upon evidence of uncharged misconduct, does not punish a person for his character. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997). The effect of Rule 404(b) is that evidence is excluded *only* when it is introduced to prove the "forbidden inference" of demonstrating the defendant's propensity to commit the charged crime. Herrera v. State, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999).

Here, the trial court permitted the State to introduce evidence showing that D.G. was scheduled to testify in Jones' pending trial for dealing in cocaine, but the court did not permit the State to reveal that Jones had actually been convicted of dealing in cocaine

in that case. The State claims, and we agree, that this evidence was relevant to show Jones's motive. See Allen v. State, 925 N.E.2d 469, 478-79 (Ind. Ct. App. 2010) (evidence of defendant's extra-marital affairs was admissible to prove his motive to kill his wife and infant child where defendant was engaged in an affair at the time of the murders, had indicated that he wanted to leave his wife, and referred to his wife as a "monster" and his child as a "hollering, greedy mother f***er.").

Jones does not deny that this evidence was relevant to prove his motive; he claims instead that, although this evidence was relevant, it was unduly prejudicial. See Werne v. State, 750 N.E.2d 420, 422 (Ind. Ct. App. 2001) (even if evidence is admissible under Evidence Rule 404(b), court must still balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403). Indiana Evidence Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

Under the facts and circumstances of this case, we cannot say that the trial court abused its discretion in admitting the evidence regarding Jones's cocaine dealing. D.G. acted as a confidential informant and bought cocaine from Jones during a controlled buy, which eventually led to Jones's arrest and charges of dealing in cocaine. When Jones was released on bond, he began to threaten D.G. After burning cars belonging to D.G.'s family, Jones shot D.G. with an AK-47 rifle. The evidence regarding Jones's activity as a cocaine dealer was central to the State's theory of Jones's motive for attempting to kill

D.G., and we cannot say that the trial court abused its discretion in concluding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. See Bassett v. State, 895 N.E.2d 1201, 1212 (Ind. 2008) (evidence that defendant was on parole and that his parole conditions limited his contact with minor children and prohibited him from engaging in intimate or sexual relationship without permission from his parole officer was central to prove his motive to kill woman with whom he had an intimate relationship and the children in her care, and the probative value of this evidence was not substantially outweighed by risk of unfair prejudice).

III. Jury Instruction

Lastly, Jones complains that the trial court erred in instructing the jury regarding the intent to kill. The manner of instructing a jury is left to the sound discretion of the trial court, and we will not reverse the trial court's ruling unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Henderson v. State, 795 N.E.2d 473, 477 (Ind. Ct. App. 2003), trans. denied. Jury instructions must be considered as a whole and in reference to each other, and even an erroneous instruction will constitute reversible error only if the instructions, taken as a whole, do not misstate the law or otherwise mislead the jury. Id. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other given instructions. Id.

Here, the State tendered the following instructions regarding intent:

> Instruction No. 3
>
> Intent may be proven by circumstantial evidence. You may infer from all the surrounding circumstances what the intent of the defendant was at the time an act was committed.
>
> Instruction No. 4
>
> Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or serious injury.

Appellant's App. pp. 106-07. Jones objected to the latter instruction, claiming that the subject matter of that instruction was already covered by the former. The trial court overruled the objection and gave the State's tendered instructions to the jury.

On appeal, Jones claims that the instruction was an incorrect statement of the law, citing Corbin v. State, 840 N.E.2d 424 (Ind. Ct. App. 2006). In that case, the court wrote, "Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily injury, *in addition to the nature of the attack and circumstances surrounding the crime*." Id. at 429 (emphasis added). Jones claims that the failure to include the above-emphasized language in the jury instruction rendered the instruction improper.

We note, however, that Jones's objection to Instruction No. 4 was not based on any claim that it was an incorrect statement of the law. Instead, as he admits in his appellate brief, he objected based on a claim that the subject matter of the instruction was already covered by Instruction No. 3. He therefore failed to preserve his current claim of error for appeal. See Proffit v. State, 817 N.E.2d 675, 685 (Ind. Ct. App. 2004) (defendant waived claim that jury instruction was erroneous by not objecting to the instruction on the grounds he argued on appeal); see also Treadway v. State, 924 N.E.2d

621, 631 (Ind. 2010) (noting that "[a] party may not add to or change his grounds for objections in the reviewing court," and that "[a]ny ground not raised at trial is not available on appeal.").

But ignoring the issue of waiver, we do not agree with Jones that Instruction No. 4 was an incorrect statement of the law. The language used in Corbin, i.e., that the intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily injury *in addition to* the nature of the attack and circumstances surrounding the crime, might be a slightly more complete statement of the law. But the fact that the above-emphasized language from Corbin was not included in Instruction No. 4 does not mean that the instruction was an incorrect statement of the law. To the contrary, our supreme court has repeatedly stated that "The intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury." Bethel v. State, 730 N.E.2d 1242, 1245 (Ind. 2000) (citing Wilson v. State, 697 N.E.2d 466, 476 (Ind. 1998); McEwen v. State, 695 N.E.2d 79, 90 (Ind.1998)); see also Shelton v. State, 602 N.E.2d 1017, 1022 (Ind. 1992); Elliott v. State, 528 N.E.2d 87, 89 (Ind. 1988); Lee v. State, 498 N.E.2d 972, 973 (Ind. 1986); Davenport v. State, 464 N.E.2d 1302, 1307 (Ind. 1984); Vasseur v. State, 430 N.E.2d 1157, 1160 (Ind. 1982). Thus, we cannot conclude that Instruction No. 4 misstated the law or misled the jury. Therefore the trial court did not abuse its discretion in giving this instruction to the jury.

Conclusion

The evidence was sufficient to support Jones's conviction for attempted murder, and Jones's argument to the contrary is simply a request that we reweigh the evidence

and judge the credibility of witnesses, which we will not do. The trial court did not abuse its discretion in admitting evidence that demonstrated Jones's motive for shooting at D.G. Lastly, the trial court did not abuse its discretion in instructing the jury regarding the evidence that can establish the intent to kill.

Affirmed.

RILEY, J., and BRADFORD, J., concur.