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IN THE
COURT OF APPEALS OF INDIANA

TERRY DURBIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 68A01-1012-CR-608
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable Jay L. Toney, Judge
Cause No. 68C01-0911-MR-93

August 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Terry Durbin appeals his conviction for felony murder, a class A felony.[1]

We affirm.

ISSUE

Whether sufficient evidence supports Durbin's conviction.

FACTS

In October 2009, Durbin grew marijuana to sell and had approximately forty marijuana plants. Durbin's cousin, Rick Cassity, also grew marijuana. Around mid-October 2009, Durbin told his acquaintance, Derrick Saintignon, who lived in Ohio near the Indiana state line, that he had some marijuana for sale. Saintignon told his stepfather, Pat Cheadle, about the marijuana. Cheadle, who also lived in Ohio near the Indiana state line, frequently used, bought, and sold marijuana. Saintignon arranged for Cheadle and Durbin to meet at Saintignon's house on Greenville Pike in Ohio for a potential marijuana deal.

Around October 15, 2009, Durbin and Cassity went to Saintignon's house and sold some marijuana to Cheadle.[2] After Cheadle told Durbin that he would buy marijuana from him again, Durbin and Cheadle exchanged cell phone numbers and put each other's names in their cell phone contact lists. Cheadle listed Durbin in his contact list as "Terry Hi Grow." (Tr. 226, State's Ex. 105, p. 258).

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[1] Ind. Code § 35-42-1-1(2).

[2] The marijuana that they sold was grown by Cassity.

Approximately one week later, Durbin told Cassity that he "was thinking about robbing the guy that [they] sold marijuana to." (Tr. 273). Sometime before October 31, 2009, Durbin asked David Mizner if he could get him a handgun. Mizner then bought a gun and gave it to Durbin.

Between October 27 and October 30, 2009, Durbin and Cheadle exchanged cell phone calls. Around this same time, Cheadle talked to his family and friends about going to Indiana to get three to four pounds of marijuana. On October 30, Cheadle asked his friend, Steven Greer, if he would be interested in some "higrow" marijuana that he was going to get from the "same person" with whom "he met a week or so before" and who had given him some "real good" marijuana. (Tr. 202, 205). That same day, Cheadle's daughter, Janice, saw her father with approximately $9,000 to $10,000.

On October 31, 2009, Durbin was staying at Cassity's house in Bartonia, which is near the Indiana and Ohio border. Durbin called Cheadle from Cassity's house phone, apparently to discuss arrangements for the marijuana deal. During the afternoon of October 31, 2009, Cheadle went to the shop of his friend, Ron Caudill. Cheadle told Caudill that he was going to be buying three pounds of marijuana that day for $9,000 from somebody in the "Spartansburg area." (Tr. 101). When Cheadle saw Janice that day, he told her that he was going to Spartansburg "to buy a car" and then laughed because he "meant he was doing a marijuana deal." (Tr. 117).

That evening, Cheadle stopped by the house of Saintignon's father. While he was there, he told Saintignon that "he was going to Indiana to look at a car" and "gave [Saintignon] a grin[,]" which Saintignon knew was Cheadle's "code word" for going to

"look at some pot[.]" (Tr. 151, 152). Cheadle received a call on his cell phone while he was there and stepped outside to take the call. Cheadle left in his green van around 6:00 p.m. and headed west toward Bartonia.

Meanwhile, around that same time, Durbin and Mizner were at Cassity's house in Bartonia. Cassity and his family had gone to Indianapolis, and Durbin and Mizner were the only people at the house. Durbin and Mizner smoked marijuana, drank beer, and watched television. While at Cassity's house, Durbin asked to use Mizner's cell phone and told him that his cell phone was out of minutes.[3] While Durbin was talking on Mizner's cell phone and looking out the window, a green van drove past Cassity's house. Mizner heard Durbin tell the other caller to turn around, and the green van—which was Cheadle's van—pulled into the driveway. Cell phone records reveal that on October 31 Cheadle's cell phone had an incoming call from Mizner's cell phone number at around 5:51 p.m. and that Cheadle had an outgoing phone call to Mizner's cell phone number at 6:44 p.m.

Durbin went outside through the back kitchen door and onto the deck. Shortly thereafter, Mizner heard "a loud pop" that "sounded liked a gun shot[.]" (Tr. 477). Durbin went back into the house and told Mizner to "come help him or he would shoot [him] too." (Tr. 478). When Mizner went outside, he saw "a man"—who was Cheadle—"lying on his back" on the patio and saw that he "was bleeding out of his mouth" and "had blood on his face." (Tr. 479). Durbin told Mizner to stay where he was and then went to his car and got two pairs of rubber gloves for Mizner and himself to

[3] Durbin's cell phone was the pre-paid type where he had to pay for the minutes in advance.

wear. Durbin moved Cheadle's van closer to the deck and then attempted to drag Cheadle by the ankles to the van. Durbin instructed Mizner to help him, and the two of them grabbed Cheadle's ankles, dragged his body, and put him in the van. Durbin then told Mizner to throw his gloves into the fireplace, which was in Cassity's house. Durbin, still wearing gloves, used the hose to wash down the deck. Durbin then told Mizner that he was going to drive the van and instructed Mizner to follow him. Durbin drove Cheadle's van to Greenville, Ohio, and Mizner followed in his own car. After Durbin parked Cheadle's van along a street in Greenville, he got into Mizner's car, and the two drove back to Cassity's house.

Around 9:00 p.m. that night, Cassity returned to his house and saw Durbin's car in the driveway. Cassity noticed that the sidewalk and deck were "all wet" even though it had not rained. (Tr. 261). Cassity also saw that the door was open and the lights were on but then discovered that Durbin was not there. About fifteen minutes later, Cassity saw Durbin and Mizner pull into the driveway in Mizner's car. As they got out of the car, Durbin told Mizner to follow him, and they walked to Durbin's car. Durbin opened the car door, handed Mizner $2,000, and instructed him "not to tell anybody what happened." (Tr. 491). Durbin and Mizner then went inside Cassity's house and had a beer. Cassity asked Durbin why the deck and sidewalk were wet, and Durbin claimed that he did not know. Mizner had his head down, drank part of a beer, and then left.

Durbin then asked Cassity if he needed any money. After Cassity indicated that he had a car payment due, Durbin pulled "a big wad of money" from his pocket, "counted out three one hundred dollar bills[,]" and said "here pay your car payment." (Tr. 267).

When Cassity asked him where he got the money, Durbin said that he had sold "a bunch of marijuana." (Tr. 294).

Following the crime, Durbin moved out of Cassity's house and spent a couple of nights at the home of Cassity's father, Harry Cassity. Durbin gave Harry his cell phone and told him that he had gotten a new one. Durbin then went to Tennessee.

After Mizner left Cassity's house on October 31, he called his friend Robert Richards, also known as "Chi," and went to his apartment. (Tr. 367). Mizner told Chi what had happened. In the week or so that followed, Mizner and Chi went to Chicago on two separate occasions, and Mizner spent money on drugs and clothes.

On November 1, 2009, and the days following, Cheadle's family and friends attempted to contact him by phone. When they were unable to reach him, they contacted local hospitals and jails but to no avail. On November 3, 2009, Caudill and Saintignon drove around searching for Cheadle and discovered his green van, with his dead body inside, parked on a street in Greenville, Ohio. Police were then called to the scene to investigate. They found that Cheadle's shirt was pulled up and that he had scrape marks on his back, which the forensic pathologist later testified were consistent with being dragged on his back by his feet. The pathologist also determined that Cheadle's death was a homicide and that Cheadle had been killed by a gunshot wound to the head. The police also found that Cheadle had on his person a small amount of marijuana, rolling papers, $3,000 in cash, and his cell phone.

Greenville Police officers used Cheadle's cell phone as a starting point in their investigation of his death. Initially, the police came up with Cassity's and Mizner's

names as suspects after they discovered that Cheadle's cell phone had incoming or outgoing calls from Cassity's home phone and Mizner's cell phone on October 31. The police interviewed Cassity and then obtained a search warrant under which they dismantled part of Cassity's deck and discovered a "large pooling of blood" inside the deck frame. (Tr. 396). The blood was later tested and determined to be Cheadle's blood.

Around November 9 or 10, Durbin, while in Tennessee, learned from his brother that the Greenville police wanted to speak with him. Durbin ultimately returned to Indiana and turned himself into police on November 12.

Later, a police officer called Mizner and told him the police needed to talk to him. Mizner asked one of his friends if she would be an alibi for him, and she initially agreed but then refused to do so.

The State charged Durbin with Count I, murder, a class A felony; Count II, felony murder, a class A felony; and Count III, robbery as a class A felony.[4] A jury trial was held on October 25-29, 2010. During the trial, Mizner testified that he had gotten a gun for Durbin prior to the crime; did not know about the plan for the drug deal or robbery; did not know about the shooting until after it occurred; helped Durbin move the body and take it to Greenville because he was scared; returned with Durbin to Cassity's house and took money from Durbin out of fear; did not report the crime to police; spent some of the money in Chicago to buy drugs and clothes; and had lied to police during his police interview. On cross-examination, Durbin's defense counsel thoroughly attempted to impeach Mizner by pointing out inconsistencies between his trial testimony and his

[4] The State also initially charged Durbin with class B felony conspiracy to commit robbery but dismissed that charge prior to trial.

deposition testimony, previous statements to police, and other witnesses' testimony. The State also attempted to impeach Mizner's testimony regarding the details surrounding the crime and his prior knowledge of and participation in the robbery. During closing argument, the State acknowledged that Mizner "lies like a rug," (tr. 734), and "lacks credibility," (tr. 757), but pointed out that "there are parts of David Mizner's story that are truthful." (Tr. 757). The State told the jury:

> [W]hen [Mizner] is telling things you know are truthful like this is where it happened, this is how it happened, this is where the location was, you know those things are the truth, not because we believe David Mizner is necessarily a truthful person, but because they are cooberated [sic] by things.

(Tr. 757).

Durbin testified on his own behalf and admitted that he had sold marijuana to Cheadle at Cassity's house but claimed that he did not kill Cheadle. Durbin testified that after the drug deal, he went to Mizner's house to tell him about the possibility of selling marijuana to Cheadle, gave Cheadle's cell phone number to Mizner, saw Mizner call Cheadle, left Mizner's house, went to a couple of other people's houses, and ultimately went back to Cassity's house by himself.

The jury found Durbin guilty of felony murder and robbery but not guilty of murder. Prior to sentencing, Durbin filed a motion to vacate his robbery conviction on double jeopardy grounds, and the trial court granted the motion. Thereafter, the trial court sentenced Durbin to sixty years for his felony murder conviction.

DECISION

Durbin argues that the evidence was insufficient to support his conviction for felony murder.

> When reviewing the sufficiency of the evidence to support a 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 elements of 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).

Durbin argues that there is insufficient evidence to support that he was perpetrator of the crime. Specifically, he argues that this court should reverse his conviction under the incredible dubiosity rule because the only State's witness to directly connect Durbin to the robbery and death of Cheadle was Mizner, who "is a habitual liar." Durbin's Br. at 10.

Under the incredible dubiosity rule, appellate courts may impinge upon a jury's function to judge the credibility of a witness when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Whatley v. State*, 908 N.E.2d 276, 282 (Ind. Ct. App. 2009), *trans. denied.* Application of this rule is rare and is limited to cases where a single witness presents inherently contradictory testimony which is equivocal or the result of coercion and there

is a complete lack of circumstantial evidence of guilt. *Id.* In using this rule, the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.*

In support of his argument that Mizner's testimony was incredibly dubious, Durbin lists inconsistencies between Mizner's trial testimony and his previous statements to police as well as the inconsistencies between Mizner's testimony and other witnesses' testimony. Such inconsistencies, however, do not make the testimony incredibly dubious. Inconsistencies between a witness's pretrial statement and trial testimony do not make the testimony inherently contradictory. *See Corbett v. State*, 764 N.E.2d 622, 626 (Ind. 2002). Furthermore, the standard for incredible dubiosity is inherent contradiction, not contradiction between witnesses' testimony. *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001), *cert. denied*. As such, any inconsistencies in the testimony of multiple witnesses goes to the weight and credibility of the witnesses' testimony and do not render the testimony incredible. *Id.* "It is for the trier of fact to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve." *Ferrell v. State*, 746 N.E.2d 48, 51 (Ind. 2001). "If the testimony believed by the trier of fact is enough to support the verdict, then the reviewing court will not disturb it." *Id.*

At trial, Mizner unequivocally identified Durbin as the person that killed and robbed Cheadle. Mizner testified that Durbin shot Cheadle on Cassity's deck, had Mizner help him drag Cheadle's body by his ankles to Cheadle's van, washed the blood off the deck with a garden hose, and drove the van with Cheadle's body to Greenville, Ohio. Mizner also testified that he and Durbin then returned to Cassity's house, where

Cassity questioned Durbin about why the deck and sidewalk were wet when it had not rained. The State presented testimony from Cassity that Durbin told him about a week or so before the crime that Durbin "was thinking about robbing" Cheadle. (Tr. 273). Cassity also testified that when he returned to his house during the evening of October 31, he noticed that Durbin's car was in the driveway and that his deck and sidewalk were wet even though it had not rained. Cassity further testified that he saw Durbin and Mizner, who were in Mizner's car, pull into his driveway. Additionally, the State presented evidence that Cheadle's blood was found under Cassity's patio, that Cheadle's body was found in his van in Greenville, and that Cheadle's back had marks on it that were consistent with being dragged across the ground by his feet.

While there were inconsistencies between Mizner's and other witnesses' testimony regarding Mizner's knowledge and participation in the crime as well as inconsistencies between Mizner's trial testimony and his statement to police regarding peripheral facts of the crime (e.g., when Durbin returned Mizner's cell phone to him and with whom Mizner went to Chicago following the crime), the incredibly dubiosity rule is not applicable because Mizner's trial testimony was unequivocal and was corroborated by other evidence. Indeed, through the defense counsel's and the State's attempts to impeach Mizner's testimony, the jury was well aware of any inconsistencies. However, "'[t]he fact that the accomplice may not be completely trustworthy goes to the weight and credibility of the witness' testimony, something that is completely within the province of the [jury] and cannot be reviewed on appeal.'" *Stephenson*, 742 N.E.2d at 497 (quoting *Timberlake v. State*, 690 N.E.2d 243, 252 (Ind. 1997), *cert. denied*).

Durbin's argument is nothing more than an invitation for this court to judge the credibility of the witness, which we decline to do. The jury apparently believed Mizner's testimony, which was sufficient to support a guilty verdict for felony murder, and we decline to impinge on the jury's credibility determinations. *See, e.g.*, *Ferrell*, 746 N.E.2d at 51 (explaining that the incredible dubiosity rule did not apply where there were inconsistencies in the testimony among witnesses but no one witness contradicted himself and did not waver in trial testimony). Accordingly, we affirm Durbin's conviction for felony murder.

Affirmed.

RILEY, J., and BARNES, J., concur.