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IN THE
COURT OF APPEALS OF INDIANA

MARCO WASHINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0901-CR-13
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0806-MR-7

September 4, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Marco Washington ("Washington") was convicted in St. Joseph Superior Court of Class A felony conspiracy to commit murder, Class A felony voluntary manslaughter, and Class B felony conspiracy to commit carjacking. The trial court sentenced Washington to an aggregate term of fifty-four years incarceration. Washington appeals and presents two issues for our review, which we restate as: (1) whether the trial court erred in sentencing Washington to consecutive sentences, and (2) whether the jury's verdicts finding Washington guilty of both conspiracy to commit murder and voluntary manslaughter are improperly inconsistent.

We affirm.

Facts and Procedural History

On May 16, 2008, Landris McFadden ("McFadden") asked his friend Brandon Simpson ("Simpson") if he could borrow Simpson's Chevrolet Impala for a date that evening. Simpson agreed and drove McFadden's Dodge Charger with another friend, Donnell Wilderness ("Wilderness"). Later that night, McFadden and Simpson drove each other's cars to a gas station in South Bend, Indiana.

Also on that night, Darnell Perry ("Perry") drove a Suzuki SUV to the same gas station. In the Suzuki with Perry were his girlfriend and his friends Jerry Young ("Young") and defendant Washington. Young had been in a fight with Simpson several days before. When Young saw McFadden in Simpson's Chevrolet at the gas station, he stated, "I'm going to get that car." Tr. pp. 189. Washington said, "let's block him in . . . so he can't get away." Tr. p. 190-91. Perry then parked his vehicle in such a manner as to prevent Simpson's car from leaving. Young and Washington then got out of the

Suzuki and approached McFadden in the Chevrolet. Washington told Young, "If you're going to get it [i.e., Simpson's car], get it." Tr. p. 192. Brandishing a handgun, Young ordered McFadden out of the Chevrolet, got in the car himself, and drove away. Washington got back into the Suzuki, which also drove away along with the stolen Chevrolet.

As Simpson watched his car being driven away, McFadden came over to Simpson and Wilderness in the Dodge. McFadden got into the back seat of his car and told Simpson and Wilderness that he had been carjacked. McFadden and his friends then drove away in the Dodge in search for his stolen Chevrolet while McFadden used his mobile phone to report the incident to the police.

Meanwhile, Perry dropped his girlfriend off at his mother's house and followed Young in the Chevrolet to look for a place to hide the stolen car. Eventually, they parked the stolen car in a friend's garage. Perry then drove his Suzuki, with Young and Washington as passengers, back to Perry's mother's house. When they got to the house, however, they saw Wilderness, Simpson, and McFadden in the Dodge looking for Simpson's stolen car. When the two vehicles passed each other on the street, Perry made a u-turn in the Suzuki and started following the Dodge. McFadden told his friends that Young had a gun, at which time Wilderness gave a handgun to Simpson, who fired a shot out the window in the direction of the pursuing Suzuki.

Perry chased after the Dodge down the street, eventually reaching speeds of eighty to ninety miles per hour. Perry and his compatriots in the Suzuki eventually caught up with the Dodge. Washington told Young to "shoot, shoot," and Young fired a handgun at

the Dodge. Tr. p. 201. Simpson returned fire at the Suzuki. At some point, Young's handgun jammed. Washington cleared the jammed handgun and fired the last three rounds of ammunition at the Dodge.

One of the shots fired at the Dodge went through the trunk and back seat of the car and struck McFadden in the back. McFadden yelled, "I'm hit," and slumped over in the back seat. Tr. p. 329. Wilderness drove the Dodge to a police station and eventually found a police officer and asked for help. The police officer helped remove an unconscious McFadden from the back seat and administered CPR until an ambulance arrived to take McFadden to the hospital. The bullet hit one of McFadden's ribs, and damaged his left lung, diaphragm, spleen, stomach, liver, and heart. McFadden was pronounced dead at the hospital. The cause of McFadden's death was loss of blood and damage to his internal organs.

On June 24, 2008, the State charged Washington with Class B felony conspiracy to commit carjacking, Class A felony conspiracy to commit murder, and murder. Washington fled to Chicago, where he was eventually arrested by a United States marshal and returned to Indiana. A jury trial was held on November 18 through November 20, 2008. The jury found Washington guilty of Class B felony conspiracy to commit carjacking and Class A felony conspiracy to commit murder but found Washington guilty of Class A felony voluntary manslaughter as an included offense of murder. At a sentencing hearing held on December 18, 2008, the trial court sentenced Washington to fourteen years for carjacking, forty years for conspiracy to commit murder, and forty years for voluntary manslaughter. The trial court ordered the forty-year sentences to be

served concurrently, but consecutive to the fourteen-year sentence, for an aggregate term of fifty-four years. Washington now appeals.

I. Consecutive Sentences

Washington first claims that the trial court erred in sentencing him to consecutive sentences, claiming that such was improper because his convictions arose out of a single episode of criminal conduct. Specifically, Washington claims that "the actions that took place were so compressed in time, place, and singleness of purpose and continuity of action as to constitute a single transaction." Appellant's Br. p. 9. We take Washington's claim to be that the trial court violated the restrictions upon imposing consecutive sentences found in Indiana Code section 35-50-1-2 (2004 & Supp. 2009).[1] The relevant portion of this statute states that, subject to certain exceptions not applicable here:

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, *except for crimes of violence*, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under [the habitual offender statutes], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

I.C. § 35-50-1-2(c) (emphasis added). An "episode of criminal conduct" is defined as "offenses or a connected series of offenses that are closely related in time, place, and

[1] In his argument regarding the propriety of his consecutive sentences, Washington alludes to the prohibition of double jeopardy found in Article 1, Section 14 of the Indiana Constitution. As noted by the State, the remedy Washington seeks, i.e., concurrent sentences, is inconsistent with a claim of double jeopardy, for which the remedy is vacation of the lesser conviction constituting double punishment. See Clark v. State, 752 N.E.2d 209 (Ind. Ct. App. 2001). Moreover, Washington does not explain how his convictions constitute double jeopardy, and we therefore conclude that any claim of double jeopardy is waived. See Ind. Appellate Rule 46(A)(8)(a).

circumstance." I.C. § 35-50-1-2(b). A "crime of violence" is defined to include voluntary manslaughter. I.C. § 35-50-1-2(a)(3).

As explained by our supreme court in Fight v. State, 768 N.E.2d 881 (Ind. 2002), "[t]his statute limits a court's authority in imposing consecutive sentences if the convictions are not for 'crimes of violence' and the convictions 'arise out of an episode of criminal conduct.' *If both of these circumstances exist*, the total executed term is limited to the presumptive sentence of the next higher class of felony." Id. at 881-82 (emphasis added).

Here, Washington's sentence for voluntary manslaughter—and his concurrent sentence for conspiracy to commit murder—were ordered to be served consecutively to his sentence for conspiracy to commit carjacking. Washington claims that we should order that these sentences instead be served concurrently. We disagree.

Washington's conviction for voluntary manslaughter is defined as a crime of violence. I.C. § 35-50-1-2(a)(3). By the express terms of the statute itself, the limitations of Indiana Code section 35-50-1-2(c) do not apply to crimes of violence. I.C. § 35-50-1-2(c); Fight, 768 N.E.2d at 881-82. Therefore, the trial court did not err in ordering Washington's sentence for voluntary manslaughter to be served consecutively to his sentence for conspiracy to commit carjacking. See Williams v. State, 741 N.E.2d 1209, 1214 (Ind. 2001) (limitations on consecutive sentencing do not apply between crimes of violence and those that are not crimes of violence).

Even if the statute did apply, Indiana Code section 35-50-1-2(c) does not require that sentences for crimes arising out of a single episode of criminal conduct to be served

concurrently. It simply limits the length of consecutive sentences arising out of a single episode to not "exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted." The felony which is one class higher than the most serious of the felonies for which Washington was convicted is murder, for which the advisory sentence is fifty-five years. See Ind. Code § 35-50-2-3 (2004). Here, Washington's consecutive sentences totaled fifty-four years. Thus, Washington's sentence does not exceed the limits of Indiana Code section 35-50-1-2(c), even if it were applicable.

II. Inconsistent Verdicts

Washington also claims that the jury returned inconsistent verdicts when it found him guilty of conspiracy to commit murder and voluntary manslaughter. Although we review verdicts for consistency, perfect logical consistency is not required. Parks v. State, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000), trans. denied. Indeed, it is not within our province to attempt to interpret the jury's thought process in arriving at its verdict. Id; see also Hodge v. State, 688 N.E.2d 1246, 1248 (Ind. 1997) ("We will not engage in speculation about the jury's thought processes or motivation."). The jury may attach whatever weight and credibility to the evidence it believes is warranted, and the jury is free to believe portions of a witness's testimony but disregard other portions of the same testimony. Id. Therefore, when we review a claim of inconsistent jury verdicts, we will take corrective action only when the verdicts are "extremely contradictory and irreconcilable." Jones v. State, 689 N.E.2d 722, 724 (Ind. 1997). This is a rare occurrence. See, e.g., Owsley v. State, 769 N.E.2d 181, 183-85 (Ind. Ct. App. 2002)

(concluding that defendant's conviction for conspiracy to commit dealing in cocaine was impermissibly inconsistent with his acquittals for possession of cocaine and dealing in cocaine arising out of the same alleged criminal transaction), trans. denied.

Washington was convicted of conspiracy to commit murder and voluntary manslaughter. The essential elements of conspiracy to commit murder are: (1) the defendant (2) agreed with one or more other persons to commit murder (3) with intent to commit murder and (4) the defendant *or one of the persons to the agreement performed an overt act in furtherance of the agreement*. Jack v. State, 870 N.E.2d 444, 447 (Ind. Ct. App. 2007) (citing Ind. Code § 35-41-5-2 (2004)).

The State alleged that Washington agreed with Young to commit murder, with the intent to commit murder, and that *Young performed the overt act* of firing a handgun in furtherance of the agreement. In support of this, the State presented evidence that Washington told Young to shoot the gun at the Dodge and that Young did indeed shoot the gun at the Dodge.

Washington does not directly deny this. Instead, he claims that he cannot be guilty of conspiracy to commit murder because the jury also found him guilty of voluntary manslaughter as a lesser included offense of the charged crime of murder. Specifically, Washington claims that "for all intents and purposes no murder occurred but voluntary manslaughter." Appellant's Br. p. 12. Washington misunderstands the relationship between murder and voluntary manslaughter.

Class A voluntary manslaughter is defined as knowingly or intentionally killing another human being while acting under sudden heat. Ind. Code § 35-42-1-3(a) (2004).[2] Our supreme court has held that voluntary manslaughter is a "lesser-included offense of murder." Watts v. State, 885 N.E.2d 1228, 1232 (Ind. 2008). However, the court recognized that voluntary manslaughter is not a typical example of a lesser-included offense. Id. In most instances, a conviction for a lesser-included offense requires proof of some, but not all, of the elements of the charged crime. Id. "In the case of voluntary manslaughter, however, sudden heat is a mitigating factor, not an element, that the State must prove *in addition* to the elements of murder." Id. In other words, "[v]oluntary manslaughter is not established by proving less than or all of the elements of murder. I*t is established by proving all of the elements of murder*, plus sudden heat, which is a mitigating factor." Misztal v. State, 598 N.E.2d 1119, 1122 (Ind. Ct. App. 1992), trans. denied (emphasis added).[3]

Based on the evidence presented here, the jury could have properly found that Young fired several shots at Washington's urging (and thus committed the crime of conspiracy to commit murder) and could also have properly found that Washington himself took the gun from Young, unjammed it, and then fired the remaining shots during the heat of an extended high-speed chase (and thus committed the crime of voluntary

[2] Voluntary manslaughter is a Class B felony but is elevated to a Class A felony if committed by means of a deadly weapon. Id.

[3] Double jeopardy issues aside, it is not theoretically inconsistent for the jury to find a defendant guilty of both murder and voluntary manslaughter for a single killing. Id. Of course, in practice, a conviction for voluntary manslaughter has the effect of acting as an acquittal of the greater charge of murder. Watts, 885 N.E.2d at 1232.

manslaughter). Based on the evidence before it, the jury could have found that Washington was not acting under sudden heat when he urged Young to shoot the gun, but that he was acting under sudden heat when he fired the last three shots. The existence of two shooters makes the jury's verdicts consistent. In fact, the jury's verdicts reveal a rather sophisticated analysis of the chaotic facts of this case.

Furthermore, the fact that the jury found that Washington acted under sudden heat when he shot the gun himself does not negate the fact that Washington still acted with the *mens rea* required for murder. Indeed, to find him guilty of voluntary manslaughter, the jury still had to find that he knowingly or intentionally killed McFadden. See Watts, 885 N.E.2d at 1232 (to prove voluntary manslaughter, the State must prove the elements of murder *in addition* to sudden heat). Under the facts and circumstances present in this case, the jury's verdicts finding Washington guilty of voluntary manslaughter and conspiracy to commit murder are entirely consistent. See Misztal, 598 N.E.2d at 1123-24 (holding that trial court erred in rejecting as defective jury's verdicts finding defendant guilty of both murder and voluntary manslaughter arising out of the same killing because such verdicts were not logically inconsistent); State v. Robinson, 643 A.2d 591, 596 (N.J. 1994) ("[A] finding of guilt of . . . manslaughter does not suggest that a defendant did not intend to kill.").

Conclusion

The trial court did not err in ordering Washington's concurrent sentences for conspiracy to commit murder and voluntary manslaughter to run consecutively to his

sentence for conspiracy to commit carjacking. Washington's convictions for voluntary manslaughter and conspiracy to commit murder are not inconsistent.

Affirmed.

DARDEN, J., and ROBB, J., concur.