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IN THE
COURT OF APPEALS OF INDIANA

PHUOC V. TRAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-CR-198
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 5
The Honorable Mark A. Jones, Judge Pro Tempore
Cause Nos. 49G05-0810-FB-236577 and 49G05-0810-FB-239336

September 10, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Phuoc V. Tran (Tran), appeals his conviction for robbery, a Class B felony, Ind. Code § 35-42-5-1; resisting law enforcement, a Class D felony, I.C. § 35-44-3-3(b)(1); possession of a firearm by a serious violent felon, a Class B felony, I.C. § 35-47-4-5; and his adjudication as a habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUES

Tran raises two issues on appeal, which we restate as follows:

(1) Whether the trial court erred by joining Tran's charges stemming from the original robbery and his flight from the scene of that robbery a few days later; and

(2) Whether the trial court abused its discretion when it denied Tran's motion to withdraw his guilty plea.

FACTS AND PROCEDURAL HISTORY

At approximately 2:45 a.m. on October 12, 2008, Jeffrey Haynes (Haynes) left the Paradise Cove Bar and Gentleman's Club on the southeast side of Indianapolis, Indiana. As he entered his truck in the parking lot, he "got hit in the head, in the face . . . real hard." (Transcript pp. 173-74). Looking around, he noticed two men standing near him, a black male, later identified by a witness as Tran, and an unidentified white male companion. Tran pointed a gun at him while the white male demanded Haynes' money. The white male

reached into Haynes' pocket and took his money and driver's license. The two men then ran to a car and left the parking lot.

Three days later, on October 15, 2008, Indianapolis Metropolitan Police Department Officer Kevin Wethington (Officer Wethington) went to the bar to interview employees about the robbery. The employees informed the Officer that the suspects' car was a compact, four-door car of foreign make with a tan or beige color. The Officer learned that Gary Stucker (Stucker), a bar employee who works security and performs other duties, was not expected at the bar for several more hours. Officer Wethington decided to return the following day to interview Stucker.

Around 8:30 p.m. one evening that same week,[1] Tran entered the bar, stood near the front entrance and motioned Stucker to come over and speak to him. After walking up to Tran, Stucker asked him "what's up and [Tran] asked [Stucker] if he could come in the bar." (Tr. p. 267). When Tran asked this, Stucker "thought, I had heard that it was him and that to me kind of confirmed that it was and I thought, no, you know, it's not a good idea for you to come in the bar." (Tr. p. 268). Stucker told Tran that he could not enter the bar. As he walked back, Stucker heard a knock at the side door of the bar. When he opened the door, he saw Officer Wethington who had returned to question him. Stucker immediately told Officer Wethington that the man he was looking for was leaving the bar. Looking around the corner

[1] The transcript reveals conflicting evidence regarding the exact days both events took place. The robbery occurred around 2:45 a.m. on Sunday, October 12, 2008. However, Stucker testified that the subsequent events took place on the following Monday or Tuesday, whereas Officer Wethington testified that chase and apprehension occurred in the evening of Thursday, October 16, 2008.

of the bar, the Officer noticed Tran's car, which matched the description to the vehicle given to him earlier, backing out of a parking space.

Officer Wethington returned to his car and followed Tran's car into an adjacent street. When Officer Wethington attempted to stop Tran, a car chase ensued. The chase eventually ended at a dead end street where Tran jumped out of his car and ran into a wooded area. A canine unit located and apprehended Tran in the backyard of a home. Inside Tran's car, the police located a revolver underneath the driver's seat.

On October 21, 2008, the State filed an Information in cause number 46G20-0810-FB-236577 (cause 577) charging Tran with unlawful possession of a firearm by a serious violent felon, a Class B felony, and two Counts of resisting law enforcement, as a Class D felony and as a Class A misdemeanor. On the same day, the State filed a second Information in cause number 46G05-0810-FB-239336 (cause 336) charging Tran with robbery, a Class B felony, and battery, a Class C felony. On October 24, 2008, cause 577 was transferred to the same trial court as cause 336. On December 1, 2008, the State amended the Information in cause 336 and added a habitual offender charge.

On December 8, 2008, the State filed a motion to join both causes on the ground that both causes were based on the same conduct or a series of connecting acts constituting a single scheme or plan. On December 19, 2008, after a hearing, the trial court granted the State's motion over Tran's objection. On January 12, 2009 through January 13, 2009, a jury trial was held on the combined charges of robbery, battery, and two Counts of resisting law enforcement. At the close of the evidence, the jury found Tran guilty of robbery and both

Counts of resisting law enforcement, but not guilty of battery. Following this verdict, Tran pled guilty to possession of a firearm by a serious violent felon and admitted to being a habitual offender. The plea agreement left sentencing to the discretion of the trial court but stated that any sentence imposed for possession of a firearm by a serious violent felon would be served concurrent to any sentence imposed for the robbery conviction.

On January 22, 2009 and February 3, 2009, Tran filed *pro se* motions to withdraw his guilty plea. On February 3, 2009, during the sentencing hearing, the trial court denied Tran's motion to withdraw his plea. The trial court sentenced Tran to the Department of Correction for seventeen years on the robbery charge and enhanced the sentence by twenty-five years for the habitual offender adjudication. The trial court further sentenced him to a consecutive term of two and one-half years for resisting law enforcement, as a Class D felony, and seventeen years for possession of a firearm by a serious violent felon, to be served concurrent to his robbery sentence.

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

DISCUSSION AND DECISION

I. *Joinder of Charges*

First, Tran contends that the trial court erred by joining both causes because the incidents on October 12, 2008 and October 16, 2008 are separate and distinct occurrences which are not part of a single scheme or plan.

Indiana Code section 35-34-1-9, which authorizes the joinder of charges, reads, in pertinent part:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Under Indiana Code Section 35-34-1-11(a),

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> > (1) the number of offenses charged;
> > (2) the complexity of the evidence to be offered; and
> > (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Unless the defendant is entitled to severance as a matter of right under I.C. § 35-34-1-11(a), whether to sever multiple charges is a matter within the trial court's discretion and a denial of severance will be reversed only on showing of clear error. *Heinzman v. State*, 895 N.E.2d 716, 720 (Ind. Ct. App. 2008), *trans. denied*. Here, Tran does not assert severance as a matter of right.

Despite occurring a couple of days apart, the facts underlying both incidents are intertwined and part of a single scheme or plan. Tran returned to the bar after the robbery and asked Stucker if he could enter. Though his conversation was not explicit, Stucker testified that he interpreted Tran's question as an acknowledgment by Tran that he was

involved in the robbery. Stucker notified Officer Wethington when he arrived and the Officer saw Tran leave the bar's premises in a vehicle that matched the description of the car used by the robbery suspects. After a chase and after Tran abandoned his car, the police discovered a gun in the vehicle. However, the victim and witnesses to the robbery could not provide a description of the gun and evidence could not link or exclude the gun found as the weapon used in the robbery. The circumstances surrounding Tran's flight and the discovery of the weapon are relevant circumstantial evidence tying him to the robbery.

Tran is now arguing that tying both events together would constitute impermissible use of evidence of other bad acts to prove his guilt, pursuant to Indiana Evidence Rule 404(b). Indiana Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admitted for other purposes such as proof of motive, preparation, plan, knowledge, identity or absence of mistake. Evid. R. 404(b). While primarily applied in the context of prior criminal acts, the rule has been given a broad interpretation and has been held to apply to any conduct which may bear adversely on the jury's judgment of a defendant's character. *See Kimble v. State*, 659 N.E.2d 182, 184 n.5 (Ind. Ct. App.1996), *trans. denied*. Thus,

> the principal risks of unfair prejudice presented by *uncharged* misconduct evidence are that the jury will infer that the defendant is a bad person who should be punished for other, uncharged misdeeds, and that the jury will draw the forbidden inference that the defendant's character is such that [he] has a propensity to engage in conduct of the sort charged, and that [he] acted in conformity with that character on the occasion at issue in the charge.

Garland v. State, 788 N.E.2d 425, 428-29 (Ind. 2003) (emphasis added). Here, Tran is relying on *charged* misconduct to establish his claim based on Evid. R. 404(b). As such, we find Evid. R. 404(b) to be inapplicable.

In sum, based on the evidence before us, we conclude that the trial court properly joined both causes because the incidents on October 12, 2008 and October 16, 2008 are part of a single scheme or plan pursuant to I.C. § 35-34-1-9 and the trial court did not abuse its discretion by refusing to separate both causes.

II. *Motion to Withdraw Guilty Plea*

Next, Tran argues that the trial court abused its discretion by denying his motion to withdraw his guilty plea. In essence, Tran wants to withdraw his guilty plea because he claimed not to "have a full understanding about the agreement." (Tr. p. 569). Indiana Code section 35-35-1-4(b) governs motions to withdraw guilty pleas. After a defendant pleads guilty but before a sentence is imposed, a defendant may motion to withdraw a plea of guilty. *Id*. The trial court must allow a defendant to withdraw a guilty plea if "necessary to correct a manifest injustice." *Id*. In contrast, the trial court must deny the motion if withdrawal of the plea would "substantially prejudice" the State. In all other cases, the trial court may grant the defendant's motion to withdraw a guilty plea for any fair and just reason. *Id*.

A trial court's ruling on a motion to withdraw a guilty plea "arrives in this court with a presumption in favor of the ruling." *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995). We will reverse the trial court only for an abuse of discretion. *Id*. In determining whether a trial court has abused its discretion in denying a motion to withdraw a guilty plea, we examine the

statements made by the defendant at his guilty plea hearing to decide whether his plea was offered "freely and knowingly." *Id*.

After Tran was found guilty of robbery and resisting law enforcement, Tran and the State reached a plea agreement whereby Tran would plead guilty to possession of a firearm by a serious violent felon and admitted to being a habitual offender. During the plea hearing, Tran acknowledged that he read and spoke English sufficiently to understand the plea agreement and had reviewed the terms of the plea with his counsel prior to signing it. The record reveals that the trial court questioned Tran at length about his understanding of the terms of the agreement, the rights he was forsaking by pleading guilty, and the legal consequences of the plea agreement. The trial court also ensured that Tran understood that because he was Vietnamese, Homeland Security "may deport [him] back to Vietnam." (Tr. p. 527). After an extensive investigation by the trial court, Tran acknowledged that his plea was a "voluntary act," entered into without any coercion, threats, or promises. (Tr. p. 548).

Prior to sentencing, the trial court revisited the circumstances of the plea agreement and questioned Tran. Again, the trial court concluded that the plea agreement was entered into voluntarily and denied Tran's motion to withdraw his plea agreement. In light of these circumstances, we find that the trial court established that Tran had entered his plea agreement freely and knowingly and therefore properly denied Tran's motion.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err by joining Tran's charges stemming from the original robbery and his flight from the scene of that robbery a

few days later; and the trial court did not abuse its discretion by denying Tran's motion to withdraw his guilty plea.

Affirmed.

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