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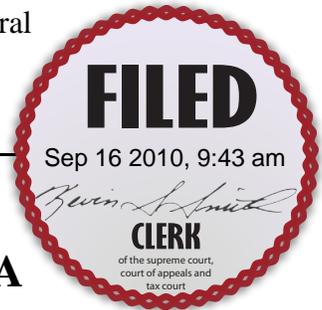
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**IN THE
COURT OF APPEALS OF INDIANA**

CALVIN SANDERS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-0912-CR-714

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 22
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0903-FA-30072

September 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Calvin Sanders (Sanders), appeals his conviction for attempted murder, a Class A felony, Ind. Code §§ 35-41-5-1; 35-42-1-1.

We affirm.

ISSUE

Sanders raises one issue on appeal, which we restate as: Whether the trial court abused its discretion by excluding evidence that Sanders' alleged accomplice was suspected of being involved in a shooting two years prior to the instant offense.

FACTS AND PROCEDURAL HISTORY

On April 27, 2007, Carmen Barlow (Barlow) hosted a barbecue at her apartment in Indianapolis, Indiana. Sisters Monica Berry (Berry) and Amy Sanford (Sanford) each lived in different apartments in the same apartment complex. Guests at the barbecue mingled between Barlow and Berry's apartments. One of these guests was Sanders, who was engaged in a sexual relationship with Berry. Anthony Furman (Furman), the father of Berry's daughter, also attended the party and became intoxicated as the evening wore on.

During the course of an argument between Furman and several others, Michael Hooten (Hooten), another guest at the party, flashed an automatic gun at Furman. Furman left the party and returned to his residence where he slept for a while before going back to the party. When he returned, Furman argued with Berry and slapped her in the face. Upset, Berry went to her sister's apartment to lay down in an upstairs bedroom. Sanders entered the bedroom and asked Berry "[d]id that n***** put his hands on you?" (Transcript p. 230).

Still crying, Berry responded that Furman had slapped her. Immediately, Sanders walked out of the room.

Meanwhile, Furman started looking for Berry and walked into Sanford's apartment. Sanford told him that Berry was upstairs. When Furman looked up the stairs he noticed Hooten and Sanders talking to Berry at the top of the stairs. Furman made a derogatory remark to Berry and Hooten and Sanders responded by calling him a "stupid m*****f*****." (Tr. p. 177). Furman responded with "F*** Y'all." (Tr. p. 177). All three men argued back and forth, making threatening remarks. Hooten and Sanders left the apartment and Sanford took Furman onto the porch to talk to him and to calm him down before he also left. While walking to his car, Furman saw "the same two guys [he] saw on the top of the stairs" come out of the darkness. (Tr. p. 184). Hooten and Sanders confronted Furman and started shooting at him. Furman, who was unarmed, was shot seven times.

Officer Michael Kavanaugh (Officer Kavanaugh) of the Indianapolis Metropolitan Police Department was patrolling in the vicinity of the shooting when he heard between ten and twelve shots ring out. A "shots fired" call was dispatched at approximately 2:08 a.m. and Officer Andrew Rolinson (Officer Rolinson) of the Indianapolis Metropolitan Police Department arrived on the scene within five minutes. (Tr. p. 15). Furman, unconscious, was transported to Wishard Hospital.

A Desert Storm veteran, a guest at Barlow's party, informed officers that he had heard two guns firing: one louder, indicating a larger caliber and one softer, indicating a smaller caliber. At the scene, officers located nine 9mm shell casings but could not locate a

corresponding 9mm semiautomatic handgun. The officers also suspected that the second gun involved was likely a revolver, which would be quieter than a 9mm gun and would not have ejected casings at the scene.

Later that night, Sanders returned to Barlow's apartment. He appeared upset and nervous. His hair was no longer in braids, as it had been earlier that evening, but was unkempt and messy. He asked Barlow whether the officers had found ".22 bullet casings." (Tr. p. 207). Barlow went outside and told Officer Rolinson about Sanders' question. She also informed him that the man in her living room had been involved in the shooting and had hidden a firearm in a van in the parking lot.

When confronted by Officer Rolinson, Sanders stated that he walked to the apartment from his home and denied having driven a van. However, when patted down, keys to a van were found in Sanders' front pocket. When officers searched the van, located in the apartment's parking lot, they found a fully loaded .22 caliber revolver wrapped in a jacket in the back of the van. Sanders denied any knowledge of the gun.

On May 22, 2007, officers spoke with Furman. Furman indicated that he was shot by the men who had argued with him on the stairs in Sanford's apartment. Furman identified Hooten in a photo array and while he also pointed to Sanders' photo he stated "I cannot tell you a hundred percent that's him, but I know that's him." (Tr. p. 338). In the photo line-up, Sanders was depicted with unkempt, messy hair instead of the braids he wore during the altercation with Furman. Sanford identified Sanders as one of the two individuals Furman had argued with on the stairs in her apartment. Later that summer, Sanders told Berry "[y]ou

know, I shot your baby's daddy. Don't tell on me." (Tr. p. 237). Berry told her sister Sanford, who eventually informed the police.

On March 6, 2009, the State filed an Information charging Sanders with attempted murder, a Class A felony. On October 26 through 27, 2009, a jury trial was conducted. During trial, Sanders' counsel attempted to question Officer Peter Perkins (Detective Perkins) with the Indianapolis Metropolitan Police Department, one of the responding police officers to the shooting, about a 2005 shooting of Jimmy Spivey (Spivey). The State objected to this line of questioning based on relevancy grounds. During his offer of proof, Sanders' counsel stated that Detective Perkins would testify that he suspected Hooten of being involved in this 2005 shooting where a 9mm gun had also been used. Upon being questioned by the trial court, Detective Perkins informed the court that his suspicion about Hooten's involvement was "[j]ust a hunch." (Tr. p. 144). The trial court sustained the objection and excluded the evidence. At the close of the evidence, the jury found Sanders guilty as charged. On November 18, 2009, during a sentencing hearing, the trial court sentenced Sanders to forty years imprisonment in the Department of Correction.

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

DISCUSSION AND DECISION

Sanders contends that the trial court abused its discretion by excluding the evidence of Hooten's suspected involvement in a 2005 shooting. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004). An abuse of discretion occurs if a trial court's decision is clearly

against the logic and effect of the facts and circumstances before the court. *Id.* However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error if the error is inconsistent with substantial justice or if a substantial right of the party is affected. *Id.*

At the trial, Sanders' counsel attempted to establish an evidentiary connection between Hooten, Sanders' alleged accomplice, and the shooting of Spivey that had occurred in 2005. Sanders' counsel tried to prove that the fact that Sanders did not participate with Hooten in the 2005 shooting is evidence that he was not Hooten's accomplice in the shooting of Furman. The State objected to this line of questioning based on relevancy grounds. During the offer of proof, it was established that while dating Hooten's mother, Spivey allegedly battered her. Hooten's mother left the residence, called Hooten and a short time later, Hooten and his brother showed up. During the altercation with Spivey, Spivey got shot several times with a 9mm gun. Although Spivey initially identified Hooten as the shooter, he later recanted his story. Detective Perkins stated that although he had a personal hunch that Hooten was in possession of a 9mm gun, it was never actually proven. Sanders' counsel requested to admit this evidence but the trial court decided

I'm going to deny your request to question this detective as to Hooten. Besides the fact that he was seen in the area[,] I see nothing substantial to connect him with a nine millimeter. And I don't see that your client is connected with the nine millimeter shells that were, that were found on the - -

[]

So, I see no purpose in, I think it's confusing for the jury. It's bringing in a completely - - there have been a number of persons mentioned that were in the

neighborhood that were passing through [Barlow's] house. I don't see that this [Hooten] is any more of a suspect than anybody.

(Tr p. 147).

Indiana Evidence Rule 402 provides that all relevant evidence is admissible while evidence which is not relevant is not admissible. Relevant evidence is defined as evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less than it would be without the evidence. Ind. Evidence Rule 401. Relevancy is the logical tendency of evidence to prove a material fact. *Blinn v. State*, 677 N.E.2d 51, 52 (Ind. Ct. App. 1997). Evidence that tends to prove a material fact is admissible even though its tendency to prove the material fact may be slight. *Id.* Evidence is generally admissible in a criminal proceeding if it is relevant to an issue being tried. *Id.*

Merely because Detective Perkins had a personal hunch that Hooten once possessed a 9mm gun does not make it more or less probable that Hooten might have been involved as Sanders' accomplice in Furman's attempted murder. Besides the Detective's speculation, there was no actual evidence that Hooten had participated in the 2005 shooting nor was there any actual evidence that, at that time, he possessed a 9mm gun. As such, we conclude that

excluded evidence was not relevant to the issue being tried, *i.e.*, whether Sanders had attempted to murder Furman, and as such was properly excluded by the trial court.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in excluding evidence that Sanders' accomplice was suspected of being involved in a prior unrelated shooting.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.