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IN THE
COURT OF APPEALS OF INDIANA

EDWARD D. PERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0907-CR-316
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0811-FB-160

October 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Edward Perry appeals his conviction, following a jury trial, for attempted robbery with a deadly weapon, a Class B felony. Perry raises two issues for our review, which we restate as: 1) whether the evidence is sufficient to support Perry's conviction; and 2) whether the jury instruction defining "deadly weapon" was fundamental error. Concluding the evidence is sufficient and the jury instruction was not fundamental error, we affirm.

Facts and Procedural History

On the night of November 17, 2008, Lakisha Green's residence at the Beacon Heights Apartments was broken into while Green was home. Green initially heard someone kicking at the front door of the apartment, saying they were police. Green looked through the peephole and saw a light-skinned black male, who she later identified as Perry. After Green ran and locked herself inside the bathroom, she heard Perry kicking in the front door. Perry entered the apartment and kicked in the bathroom door as well; Green fled to the living room. Green testified Perry "kept saying, where the money at?" and that Perry was armed and "had the gun up to my head." Transcript at 179. Green further testified Perry said, "the first person I see, I'm killing." Id. at 178. As South Bend police officers neared the apartment, Perry walked out of the apartment and ran from the building.

Officer Christopher Brady observed footprints in the snow and followed them from Green's apartment to another apartment in the Beacon Heights complex. Inside that apartment, Officer Brady and other officers found Perry, Perry's cousin Phillip Plump, and Plump's girlfriend, Brandy Bixby. Perry had arrived at the apartment about ten minutes

before the officers showed up and was wearing different clothing than during the break-in. In the closet, the officers found a pair of men's Timberland boots, the treads of which matched the tread marks of the footprints leading from Green's apartment. The boots did not belong to Plump, and when the officers placed them next to Perry's feet, they looked the right size even though they were size eleven and Perry said his shoe size was nine and a half.

Having identified Plump and Perry as suspects, the officers brought both men out in front of the apartment and drove Green up in a squad car. Green then identified Perry as the man who had broken into her apartment. Outside Green's apartment, Officer Christopher Slager found what looked like a black and chrome handgun but was in fact a pellet gun; Officer Slager testified, "it looked pretty realistic to me." Id. at 72.

On November 19, 2008, the State charged Perry with burglary, a Class B felony, and attempted robbery, a Class B felony. As to attempted robbery, the information alleged Perry, "while acting with the intent to commit the crime of robbery did display a handgun . . . and demand money[,] . . . a substantial step toward the commission of the crime of robbery . . ., and when the offense was committed . . . Perry was armed with a deadly weapon, to-wit: a handgun." Appellant's Appendix at 91. A jury trial was held on March 19 and 20, 2009. The final jury instructions stated:

> To convict the Defendant of . . . Attempted Robbery, a Class B felony, the State must have proved each of the following elements beyond a reasonable doubt:
>
> . . .
>
> 2. [that Perry,] acting with the intent to commit the crime of Robbery, that is, knowingly taking property from or from the presence of another person by putting the person in fear while armed with a deadly weapon

3. did display a handgun to Lakisha Green and demand money, which was a substantial step toward committing the crime of Robbery.

Id. at 18. The final instructions defined "deadly weapon" as "(1) a loaded or unloaded gun; or (2) other material that in the manner it is used, or could ordinarily be used, is readily capable of causing serious bodily injury." Id. at 20.

The jury found Perry guilty as charged, and the trial court entered judgment of conviction on both counts. On April 15, 2009, the trial court held a sentencing hearing and sentenced Perry to eighteen years executed on each count, to run concurrently. Perry now appeals his conviction for attempted robbery.[1]

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

In reviewing whether the State presented sufficient evidence to support a criminal conviction, we neither reweigh the evidence nor judge the credibility of witnesses. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Rather, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Therefore, we will affirm if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable jury to find all the elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

B. Deadly Weapon Element

To convict Perry of attempted robbery as a Class B felony, the State was required to prove Perry, 1) knowingly or intentionally, 2) took a substantial step toward taking property from a person or the presence of another person, 3) by using or threatening force or placing a person in fear, and 4) did so while armed with a deadly weapon. See Ind. Code § 35-42-5-1 (defining Class B felony robbery); Ind. Code § 35-41-5-1(a) (attempt crimes same felony class as completed crimes); see also Henderson v. State, 825 N.E.2d 983, 987 (Ind. Ct. App. 2005) (Spradlin "specific intent" rule does not apply to attempted robbery), trans. denied. "Deadly weapon" is defined, in relevant part, as "(1) [a] loaded or unloaded firearm" or "(2) [a] destructive device, weapon, device, . . . or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury." Ind. Code § 35-41-1-8(a). Perry argues the State presented insufficient evidence to prove he was armed with a deadly weapon, and that the evidence supports only the lesser-included charge of attempted robbery, a Class C felony.

1. Pellet Gun as a Deadly Weapon

As Perry concedes, the evidence supports an inference Perry broke into Green's apartment and threatened her with what looked like a handgun but was in fact a pellet gun. To determine whether a weapon is a deadly weapon, "[t]he fact finder may look to whether the weapon had the actual ability to inflict serious injury under the fact situation and whether

[1] Perry concedes on appeal that the evidence was sufficient to support his conviction for burglary as a Class B felony. Perry's challenge to the jury instructions is raised only as to the attempted robbery conviction, and Perry's request for relief is that this court vacate only the attempted robbery conviction.

the defendant had the apparent ability to injure the victim seriously through use of the object during the crime." Merriweather v. State, 778 N.E.2d 449, 457 (Ind. Ct. App. 2002). In other words, "whether a weapon is a deadly weapon is determined from a description of the weapon, the manner of its use, and the circumstances of the case." Id.

Perry argues the evidence was insufficient because the State failed to prove the particular pellet gun used in this crime was readily capable of causing serious bodily injury. We disagree. Although there may have been no direct testimony the pellet gun was capable of causing serious injury, the pellet gun was introduced into evidence as State's Exhibit 4, allowing the jurors to examine it and form reasonable inferences regarding its nature. Green and Officer Slager both mistook the pellet gun for a handgun; Officer Slager testified it "looked pretty realistic." Tr. at 72. Green testified Perry pointed the pellet gun in her face and threatened to "kill[]" occupants of the apartment. Id. at 178. Moreover, the jury was entitled to rely on its common knowledge and experience that pellet guns are similar to handguns, physically and in the harm each can cause. See Davis v. State, 835 N.E.2d 1102, 1112-13 (Ind. Ct. App. 2005) (noting BBs and pellets can penetrate a person's skin and cause loss of eyesight), trans. denied.

In addition, it is well settled that "[a]lthough not firearms, pellet or BB guns can be considered deadly weapons within the statute." Merriweather, 778 N.E.2d at 457; see Davis, 835 N.E.2d at 1112-13 (concluding sufficient evidence supported defendant's conviction for robbery with a deadly weapon; defendant entered bank and displayed unloaded BB gun that tellers believed was a firearm); Merriweather, 778 N.E.2d at 458 (concluding evidence was

sufficient that defendant used a deadly weapon; defendant entered restaurant and pointed BB gun in a threatening manner, placing customers in fear); Whitfield v. State, 699 N.E.2d 666, 671 (Ind. Ct. App. 1996) (concluding inoperable pellet gun could be considered deadly weapon within the statute), trans. denied. Therefore, the evidence was sufficient for a reasonable jury to find that the pellet gun, in the manner it could be or was in fact used by Perry, was capable of causing serious bodily injury.

2. Burden of Proving Charging Allegations

Further, Perry argues the State failed its burden of proof on the deadly weapon element because the charging information alleged Perry was armed with a handgun, and a pellet gun is not a handgun. We disagree. The general rule is the State is not required to prove every factual allegation in a criminal charge, only the "material allegation[s] descriptive of the offense." Mitchem v. State, 685 N.E.2d 671, 676 (Ind. 1997). "The general rule of Indiana criminal procedure is that what is unnecessary to allege is automatically unnecessary to prove." Id. (internal quotation and citation omitted). Indiana's indictment and information statute does not require the State to allege the specific instrumentality used in the charged crime. See Ind. Code § 35-34-1-2(a); Mitchem, 685 N.E.2d at 676. Nor was it necessary here for the State to allege Perry was armed with a handgun, as opposed to any other deadly weapon, because that is not an element of attempted robbery as a Class B felony. Therefore, we agree with the State that the allegation Perry used a handgun was mere surplusage in the charging information, and the State was not obligated to prove it at trial, only the statutory element that Perry used a deadly weapon. See Mitchem,

685 N.E.2d at 676 (concluding specific weapons alleged in attempted murder charge were not material allegations the State was required to prove).

C. Fatal Variance

Perry's argument is also cast as a contention of fatal variance between pleading and proof. Material variance between terms of the charging information and proof at trial is reversible error if: 1) the variance misled the defendant in the preparation and maintenance of his defense, and the defendant was prejudiced thereby; or 2) the defendant will not be protected against double jeopardy in a future prosecution covering the same facts and evidence. Allen v. State, 720 N.E.2d 707, 713 (Ind. 1999). However, Perry does not argue his defense was prejudiced by the variance between the charging information alleging use of a handgun and the proof at trial that a pellet gun was used, nor that he may be subject to double jeopardy in a future case specifically alleging use of a pellet gun.

In Miller v. State, 616 N.E.2d 750 (Ind. Ct. App. 1993), cited with approval in Mitchem, 685 N.E.2d at 677, we concluded a fatal variance existed between charging language specifying a handgun as the deadly weapon used to commit Class B felony criminal confinement, and proof at trial the defendant used a pellet gun. Miller, 616 N.E.2d at 755-56. However, Miller involved the significant fact that at trial, "defense counsel based her primary defense on the information," arguing the defendant was not guilty as charged because the State had not shown use of a handgun, id. at 755; therefore, the variance between pleading and proof prejudiced the defendant's defense. Here, by contrast, Perry's defense at trial did not argue the lack of proof of a handgun, either in opening or closing argument or by

presenting any testimony that a pellet gun is not a handgun. See, e.g., Tr. at 230-39 (defense closing argument). Therefore, Miller does not control because Perry's defense was not prejudiced by the variance between pleading and proof. As a result, we conclude sufficient evidence supports the jury's verdict on Class B felony attempted robbery.

II. Jury Instruction

A. Standard of Review

Generally, we review the trial court's jury instructions for abuse of discretion, and we will reverse only if error in a particular instruction misleads the jury as to applicable law and prejudices the defendant's substantial rights. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). Perry did not object at trial to the jury instruction defining "deadly weapon," so this issue ordinarily would be waived. See, e.g., Randolph v. State, 802 N.E.2d 1008, 1012 (Ind. Ct. App. 2004), trans. denied. However, Perry invokes the fundamental error exception, arguing the jury instruction was fundamental error. To rise to fundamental error, an error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Maul v. State, 731 N.E.2d 438, 440 (Ind. 2000) (internal quotation and citation omitted). "The standard for fundamental error is whether the error was so prejudicial to the rights of the defendant that a fair trial was impossible." Boatright v. State, 759 N.E.2d 1038, 1042 (Ind. 2001).

B. Deadly Weapon Instruction

In considering whether the trial court properly instructed the jury, we look at whether the instructions, taken as a whole, "inform the jury of the law applicable to the facts without misleading the jury." Stoltmann v. State, 793 N.E.2d 275, 280 (Ind. Ct. App. 2003), trans. denied. Here, the instructions defined "deadly weapon" as "(1) a loaded or unloaded gun; or (2) other material that in the manner it is used, or could ordinarily be used, is readily capable of causing serious bodily injury." Appellant's App. at 20 (emphasis added). The statute does not define any "gun" as a deadly weapon, but includes in the "deadly weapon" definition "(1) [a] loaded or unloaded firearm" and "(2) . . . other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury." Ind. Code § 35-41-1-8(a) (emphasis added).

The jury instruction was technically incorrect, because "gun" is a broader term than "firearm," and a pellet gun qualifies as a gun but not as a firearm. See Ind. Code § 35-47-1-5 (defining "firearm" as any weapon that can "expel [] a projectile by means of an explosion"). However, the jury was correctly instructed as to the part of the "deadly weapon" definition encompassing "other material . . . readily capable of causing serious bodily injury." To find Perry used a deadly weapon under this part of the definition, the jury was not required to find Perry used a firearm, only that the pellet gun he used was capable of causing serious injury. As discussed above, the jury was presented with sufficient evidence to support such a finding. This is not the hypothetical case where a defendant brandishes a "gun" made of soap and thereby would be prejudiced by an erroneous definition of "deadly weapon" as including

any gun. On the record before us, we cannot say the jury was misled by the instruction's failure to specify "firearm" as the first prong of the deadly weapon definition. Therefore, the jury instruction was not fundamental error.

Conclusion

Sufficient evidence supports Perry's conviction for attempted robbery with a deadly weapon, a Class B felony. Further, the jury instruction defining "deadly weapon" was not fundamental error.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.