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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW EMERSON, SR.	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0905-CR-300
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0812-FA-52

October 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a bench trial, Appellant-Defendant Matthew Emerson, Sr. was convicted of Class A felony Robbery,[1] Class B felony Robbery,[2] and Class A misdemeanor Carrying a Handgun Without a Permit,[3] for which he received an aggregate sentence of thirty years in the Department of Correction. Upon appeal, Emerson challenges the sufficiency of the evidence to sustain his robbery convictions and claims that the trial court abused its discretion by admitting evidence relating to his drug activity. We affirm.

FACTS AND PROCEDURAL HISTORY

At some point during the early morning hours of December 6, 2008, Andrew Myers and his fiancée Krystle Brooks, who was pregnant, were driving in South Bend when they discovered that they had missed several phone calls from Myers's friend Robert Emerson. They returned the call and learned that Robert, whose nickname was "Chip," wished to talk to Myers. According to Myers, Chip suggested that Myers pull into Sam's Food Market. Chip's vehicle, which was behind Myers's vehicle, pulled into Sam's behind Myers. There were four other persons in Chip's vehicle: his brothers Emerson and Marcus, their cousin Tyantwam Redding, and Chip's girlfriend.

According to Brooks, Myers exited his vehicle and approached Chip's vehicle, and Emerson exited Chip's vehicle and approached Myers's vehicle. Emerson sat briefly in the back seat of Myers's vehicle, then approached the passenger side and ordered

[1] Ind. Code § 35-41-2-4; 35-42-5-1 (2008).

[2] Ind. Code § 35-41-2-4; 35-42-5-1 (2008).

[3] Ind. Code § 35-41-2-4; 35-47-2-1 (2008).

Brooks out at gunpoint, asking her for money and striking her with his hand. Emerson emptied the vehicle's glove compartment, took fifteen dollars from Brooks' handbag, and pointed a gun at Brooks's abdomen.

In the meantime, after Myers approached Chip's vehicle, he entered the back seat. As the parties observed Emerson's attack on Brooks, Redding pulled out a gun, called Myers a "snitch a** n*****" and asked him what he had. Tr. p. 109. The parties exited the vehicle, where Redding and Marcus hit Myers, with Marcus hitting and pushing him with his gun. Myers gave Redding approximately sixty dollars. Marcus asked for more money, and Myers told him he had given him all he had. Shortly thereafter, Emerson, who was still armed, approached the group and said, "Shoot that snitch a** n*****." Tr. p. 110. Redding shot Myers in the leg.

From her location, Brooks heard someone say, "Shoot the n*****" and heard the gunshot. Tr. p. 51. Brooks took the injured Myers to the hospital as Emerson and his cohorts fled in Chip's vehicle. As a result of the gunshot, Myers sustained a considerable wound, suffered "tremendous" pain, and was hospitalized for five to six days. Tr. p. 119.

On December 11, 2008, the State charged Emerson with Class A felony robbery of Myers (Count I), Class B felony robbery of Brooks (Count II), Class C felony battery (Count III), and Class A misdemeanor carrying a handgun without a permit. (Count IV). During his bench trial, Emerson testified in his defense that the parties had stopped their vehicles at Sam's for Chip to purchase marijuana from Myers, and that the ensuing altercation had occurred when Myers confronted Redding about money Redding owed

him. According to Emerson's version of the events in question, Brooks's and Myers's accounts of the robberies were simply untrue.

Following his bench trial, Emerson was found guilty as charged, and the trial court entered judgment of conviction on Counts I, II, and IV.[4] At a May 20, 2009 sentencing hearing, the trial court sentenced Emerson to concurrent sentences of thirty years in the Department of Correction on Count I, ten years on Count II, and one year on Count IV. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Emerson challenges the sufficiency of the evidence to support his robbery convictions on the grounds that they were supported by incredibly dubious testimony. In addition, Emerson contends that the trial court abused its discretion in admitting evidence relating to Emerson's alleged retaliatory motive and drug activity.

I. Sufficiency of the Evidence

Our standard of review for sufficiency-of-the-evidence claims is well-settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine

[4] The trial court concluded that Count III was a factually lesser-included offense of Count I.

the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

A reviewing court will impinge upon the fact-finder's credibility judgments only when confronted with testimony of inherent improbability, or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Kien*, 782 N.E.2d at 407. A conviction will be overturned on this basis only where a victim's testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. *Id.* This exception applies only to cases where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt. *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000).

Indiana Code section 35-42-5-1 defines robbery as the knowing or intentional *taking of property* from another person or from the presence of another person. In challenging his robbery convictions, Emerson contends that Myers's and Brooks's first mention of stolen money was at trial, rather than in the interviews shortly after the incident, which he claims demonstrates that their testimony supporting the robbery convictions was incredibly dubious. Of course the fact that Myers and Brooks jointly alleged robbery by Emerson and his cohorts renders the incredible dubiosity doctrine inapplicable because the evidence was not from a single witness. *See Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind. 2002).

In addition, a conviction may rest upon the uncorroborated testimony of the victim. *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003). To the extent such testimony

contains alleged inconsistencies, discrepancies between a witness's trial testimony and earlier statements made to police do not render such testimony "incredibly dubious." *See Stephenson v. State*, 742 N.E.2d 463, 498 (Ind. 2001). The instant circumstances involved Emerson ambushing a pregnant Brooks at gunpoint, while his companions beat her fiancé and shot him in the leg, inflicting a deep, gaping wound. The fact that neither Emerson nor Brooks focused upon their lost cash under these circumstances is unremarkable and does not render their subsequent testimony regarding this cash counter to human experience. We therefore reject Emerson's incredible dubiosity challenge to Brooks's and Myers's testimony regarding their stolen money.

II. Admissibility of Evidence

Emerson challenges, on relevancy and prejudice grounds, the trial court's admission of evidence demonstrating that Myers was a drug informant and suggesting that Emerson's actions were in retaliation for Myers's informant activities. According to Emerson, "The State should not have been permitted to introduce evidence that suggested [] Emerson was involved in the drug trade and that the robbery of Myers and Brooks was in retaliation for Myers supplying information to drug officers." Appellant's Br. p. 12. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). 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.*

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." *See* Ind. Evid. R. 401. Generally speaking, relevant evidence is admissible, and irrelevant evidence is inadmissible. *See Williams v. State*, 741 N.E.2d 1209, 1211 (Ind. 2001) (citing Ind. Evid. R. 402). However, relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* (citing Ind. Evid. R. 403). A decision concerning relevance and prejudice is within the sound discretion of the trial court, and its decision is afforded a great deal of deference on appeal. *Id.* at 1212. We will only reverse a trial court upon a showing that the trial court manifestly abused its discretion and the defendant was denied a fair trial. *Id.*

First, although Emerson challenges Myers's testimony that Redding referred to him as a "snitch a** n*****" and Officer Gerald Woltman's testimony regarding Myers's informant status and belief that he was attacked for being an informant, defense counsel lodged no objections to this evidence. Emerson's challenge on this ground is therefore waived. *See Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000) (observing that failure to object to the admission of evidence at trial normally results in waiver and precludes appellate review).

Emerson also challenges the relevance of Myers's own testimony regarding his informant status, the underlying suggestion of which was that Emerson's acts were in retaliation for Myers's informant activities. Emerson apparently argues that a retaliatory motive is somehow inconsistent with the robbery charges in this case. We are unable to see how robbery and retaliation are somehow mutually exclusive, or how robbery could not be a retaliatory act. Significantly, defense counsel's objection to this evidence was

only to the extent that the prosecutor did not have a good faith basis for believing retaliation was a possible motive. The prosecutor responded that he did have such a good faith basis. Evidence of motive is always relevant in the proof of a crime. *Fry v. State*, 748 N.E.2d 369, 372 (Ind. 2001). We decline to conclude that the trial court abused its discretion in admitting this evidence on the basis that it was somehow irrelevant.

To the extent Emerson challenges this evidence as unfairly prejudicial given its suggestion that he was involved in the drug trade, Emerson testified at length about his own drug activity, including the fact that he "sometimes" purchased marijuana from Myers, that he preferred to purchase better marijuana from others, and that on the night in question his companions were again seeking to purchase marijuana from Myers. Tr. p. 259. We are unable to see how any inference of Emerson's drug activity from his alleged retaliatory motive against Myers as an informant was particularly prejudicial given his own testimony regarding his direct drug involvement with Myers. In any event, it does not substantially outweigh what we have already concluded was probative evidence of motive. We find no abuse of discretion.

Having rejected Emerson's challenges to the sufficiency and admissibility of the evidence to support his robbery convictions, we affirm those convictions.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.