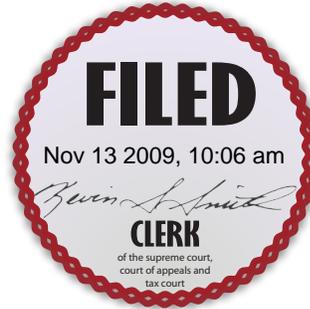


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

D.B.,)
)
Appellant- Defendant,)
)
vs.) No. 20A05-0904-CR-185
)
STATE OF INDIANA,)
)
Appellee- Plaintiff,)

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry Shewmaker, Judge
Cause No. 20C01-0806-MR-2

November 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

D.B. appeals his conviction, following a jury trial, of murder, a felony, and his resulting sixty-year sentence. For our review, D.B. raises three issues, which we restate as: 1) whether the trial court abused its discretion when it denied D.B.'s motion for a mistrial; 2) whether the trial court abused its discretion when it admitted evidence that D.B. possessed a gun prior to the murder; and 3) whether D.B.'s sentence is inappropriate in light of the nature of his offense and his character. Concluding the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial or when it admitted evidence he possessed a gun, and D.B.'s sentence is not inappropriate, we affirm.

Facts and Procedural History

On March 8, 2008, Elkhart police responded to a report of gunshots and discovered Gerald Wenger lying dead in the street with a single bullet wound to his head. Police discovered two bullet casings next to Wenger, one from a 9mm handgun and one from a .45 caliber handgun. Forensic analysis revealed Wenger's wound resulted from a 9mm bullet.

Prior to the murder, Wenger had been using cocaine with some friends. Around 1:00 in the morning on March 8, 2008, Wenger left his apartment in a red and black Ford pickup truck to buy more drugs. At approximately 3:30 a.m. on March 8, 2008, Dan Holt, who lived in the same neighborhood where the murder occurred, got up to get ready for work. Holt noticed a red and black Ford pickup truck parked in an alley near his home. Ron Troyer, who also lived in the neighborhood, saw the same truck as he arrived home from work around 9:00 p.m. on March 8, 2009. As Troyer approached, he noticed

two individuals near the truck. The individuals ran away when they saw Troyer, and Troyer called the police, who identified the red and black pickup truck as belonging to Wenger. However, forensic analysis of the truck did not reveal any fingerprints other than those belonging to Wenger.

On June 18, 2008, the State charged D.B. with murder, a felony. Although D.B. is a minor, the juvenile court waived his charges to an adult felony court. The trial court held a jury trial from February 2nd to 5th, 2009, at which it tried both D.B. and codefendant Joshua Love. At the trial, the jury heard the testimony of Leiora Davis who lives in an apartment building near the murder scene. Davis testified that sometime between the 22nd and 25th of February, 2008, D.B. visited her apartment. As D.B. bent over, a gun fell from his waist onto the floor. D.B. objected to Davis's testimony; however, the trial court admitted the testimony over D.B.'s objection, instructing the jury to consider the evidence "for the limited purpose of showing preparation and plan" and not for any other reason. Transcript at 358.

The State also presented the testimony of Mario Morris. Morris testified regarding individual conversations he had with D.B. and Love, in which each man separately confessed his respective involvement in Wenger's murder. Morris first testified about conversations he had with Love while both were in jail. Love told Morris he met Wenger on the night of the murder because Wenger wanted to buy some drugs. Love got into the back seat of Wenger's truck and attempted to sell Wenger a "gang pack," which is a substance that looks like crack cocaine, but is not really crack cocaine. When Wenger discovered the ruse, he stopped the truck and an argument ensued. Both men exited the

truck and Love shot Wenger in the head with a 9mm handgun. Love then got back into Wenger's truck and travelled to a nearby alley. Love got out of the truck and went to hide his gun. He returned later to wipe down the truck so police could not find any fingerprints. During his testimony regarding his conversations with Love, Morris never mentioned the presence of a third party during the commission of the crime and never mentioned D.B. by name or by implication.

Morris next testified about conversations he had with D.B. while both were in jail. D.B. told Morris that he met up with Wenger on the night of the murder because Wenger wanted to buy drugs. D.B. got into the front seat of Wenger's truck and decided to try to sell Wenger a gang pack. When Wenger discovered the drugs were fake, an argument ensued and Wenger demanded his money back. Both Wenger and D.B. got out of the truck and continued arguing. D.B. then pulled out a .45 caliber handgun and struck Wenger on the side of his head. As D.B. struck Wenger with the gun, it fired, grazing Wenger. D.B. then told Morris he got back into Wenger's truck and drove to a nearby alley, where he left the truck. During his testimony regarding his conversations with D.B., Morris never mentioned the presence of a third party during the commission of the crime and never mentioned Love by name or by implication.

Although he had not objected to any of Morris's testimony, at the conclusion of Morris's testimony, D.B. moved for a mistrial. The trial court heard extensive arguments from all parties and ultimately denied the motion, noting that Morris's testimony regarding his conversations with each defendant did not inculcate the other defendant. At the conclusion of the trial, the jury found D.B. guilty of murder, a felony. On March 5,

2009, the trial court held a sentencing hearing, after which it sentenced D.B. to an aggregate term of sixty years with fifty-five years executed at the Department of Correction, and five years suspended to probation. D.B. now appeals.

Discussion and Decision

I. Motion for Mistrial

A. Standard of Review

D.B. first argues the trial court abused its discretion when it denied his motion for a mistrial following Morris's testimony. The denial of a motion for mistrial lies within the sound discretion of the trial court and we review the decision only for an abuse of that discretion. Lucio v. State, 907 N.E.2d 1008, 1010 (Ind. 2009). The trial court is in the best position to assess the circumstances of an error and its probable impact on the jury. Id. "The overriding concern is whether the defendant 'was so prejudiced that he was placed in a position of grave peril.'" Id. (quoting Gill v. State, 730 N.E.2d 709, 712 (Ind. 2000)).

B. Bruton Violation¹

¹ We point out initially the possibility that D.B. waived his Bruton claim by not moving to sever his trial from Love's. Indiana Code section 35-34-1-11(b) allows a defendant to move for a separate trial because another codefendant has made an out-of-court statement which makes reference to the moving defendant. In such a situation, the trial court must require the prosecutor to elect one of three remedies: 1) a joint trial at which the statement is not admitted into evidence; 2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been redacted; or 3) a separate trial for the moving defendant. Id. The trial court discussed the possibility of a Bruton problem prior to the beginning of the trial. The State indicated it could handle the Bruton issue during Morris's testimony. D.B. did not move the trial court to sever his trial from Love's. "[I]t is a well settled principle of law that a defendant may waive his right to confront and cross-examine witnesses." Norton v. State, 772 N.E.2d 1028, 1031-32 (Ind. Ct. App. 2002). "It has also been established in Indiana that a defendant may waive his claim of a Bruton violation through error." Id. at 1032 (citing Latta v. State, 743 N.E.2d 1121, 1126 (Ind. 2001) (defendant waived post-conviction relief claim of Bruton violation by not arguing the issue on direct appeal)). In Norton, this court found a defendant waived his Bruton claim when he moved the trial court to admit a codefendant's entire statement pursuant to the doctrine of completeness despite his knowledge the previously redacted portions of the statement would implicate him in the crime. Id. at 1036. The Indiana Code provides a pre-trial remedy for a defendant who is aware of a possible Bruton issue, and it is possible the defendant's failure to seek out such a remedy, especially when combined with the defendant's failure to object to the

D.B. argues that Morris's testimony regarding statements made by the codefendant, Love, violated his constitutional right to cross-examination because he could not compel Love to testify. In Bruton v. United States, 391 U.S. 123, 126 (1968), the Supreme Court addressed the issue of the admissibility of a codefendant's pre-trial statement during a joint trial. The Court concluded a substantial risk exists that the jury might consider one codefendant's incriminating pre-trial statement against the other codefendant as well. Id. Because the former cannot be forced against his will to take the stand, the latter is denied his Sixth Amendment right to confront and cross-examine witnesses against him. Id. at 137. However, a codefendant's statements violate Bruton only if they "facially incriminate" another defendant. See Richardson v. Marsh, 481 U.S. 200, 211 (1987); Fayson v. State, 726 N.E.2d 292, 294 (Ind. 2000); Brock v. State, 540 N.E.2d 1236, 1240 (Ind. 1989).

Morris gave separate testimony regarding statements made to him by Love and D.B. respectively. At no point during his testimony regarding Love's statements did Morris mention D.B. by name or implication. In fact, Morris made no mention of a third-party being present at the crime at all. D.B. argues, however, it would be impossible for a reasonable juror hearing testimony about both statements to not connect them into a single crime. This does not create a Bruton violation, however. Each codefendant confessed to his respective involvement in the crime and provided essentially identical details. Thus, each was implicated by his own statements to Morris alone, not by the statements of the other codefendant. Love's statements did not facially incriminate D.B.,

questionable testimony during the trial, may result in a waiver of the Bruton issue on direct appeal. However, because we find no Bruton violation in this case, we need not address the waiver issue.

and therefore, no Bruton violation occurred. As a result, the trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial on the basis of the alleged Bruton violation.

II. Admission of Evidence

A. Standard of Review

D.B. next argues the trial court abused its discretion when it admitted evidence he possessed a gun approximately two weeks prior to the murder. The admissibility of evidence is within the sound discretion of the trial court, and we will not reverse its decision absent a showing of abuse of discretion. Gibson v. State, 777 N.E.2d 87, 89 (Ind. Ct. App. 2002). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the court has misinterpreted the law. Rogers v. State, 897 N.E.2d 955, 959 (Ind. Ct. App. 2009), trans. denied.

B. Prior Possession of a Handgun

Indiana Evidence Rule 404(b) provides in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Evidence Rule 404(b) prevents the State from punishing a defendant for his character by relying upon evidence of uncharged misconduct. Rogers, 897 N.E.2d at 960. D.B. argues that evidence he possessed a handgun falls within the purview of Evidence Rule

404(b) because he was a minor. See Ind. Code § 35-47-2-3(g)(3) (prohibiting the issuance of a license to carry a handgun to any person under eighteen years of age).

Accepting as true D.B.'s assertion the evidence falls within Evidence Rule 404(b), evidence that D.B. possessed a weapon of the type used in the charged crime is nonetheless relevant to a matter at issue other than D.B.'s propensity to commit murder. See Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001) (evidence defendant carried a gun two days prior to the shooting was relevant to show opportunity to commit the crime); Rogers, 897 N.E.2d at 960-61 (evidence defendant possessed a steak knife similar to the murder weapon was admissible); Pickens v. State, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (evidence defendant possessed an assault rifle two years prior to the murder was admissible). Similarly here, evidence D.B. possessed a handgun a couple of weeks prior to the murder is relevant to his opportunity to commit the crime. Therefore, the trial court did not abuse its discretion when it admitted the evidence.

III. Inappropriateness of Sentence

A. Standard of Review

Finally, D.B. argues his sentence is inappropriate in light of the nature of his offense and his character. D.B.'s sixty-year sentence is five years above the advisory sentence for murder, a felony. See Ind. Code § 35-50-2-3(a). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence "is inappropriate in light of the nature of the offense and the character of the offender." Id. When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct.

App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) (“[I]nappropriateness review should not be limited ... to a simple rundown of the aggravating and mitigating circumstances found by the trial court.”). However, the defendant bears the burden to “persuade the appellate court that his ... sentence has met this inappropriateness standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

B. Nature of the Offense

This murder resulted from D.B.’s attempt to sell counterfeit drugs to Wenger. Wenger discovered the ruse, became angry, and demanded his money back. An argument ensued between Wenger, D.B., and Love. There is no evidence Wenger became violent, possessed a weapon, or threatened harm to D.B. and Love. The only threat apparently made by Wenger was to report D.B. and Love to the police. Nonetheless, D.B. struck Wenger in the head with a handgun that fired upon impact grazing Wenger, and Love shot Wenger in the head from behind. D.B. and Love then took Wenger’s truck and left him to die in the street. These facts depict the particularly heinous murder of an unarmed man after he discovered the defendants’ scheme to sell him counterfeit drugs. Because of this, we cannot say D.B.’s sentence is inappropriate in light of the nature of his offense.

C. Character of the Offender

D.B. was thirteen years old at the time of the murder. His criminal history consists of a single juvenile adjudication for what would have been burglary, a Class B felony, if committed by an adult. The burglary occurred close in time to the murder. D.B.’s youth

and the fact this is apparently his first foray into serious crime weigh in favor of his character.

However, D.B. admitted he had used marijuana on a daily basis since he was eleven and drank alcohol almost every weekend. There is evidence that D.B. possessed a handgun two weeks prior to the murder and he struck Wenger with a handgun just prior to the murder. D.B. was also engaged in the sale of illegal drugs and attempted to sell Wenger counterfeit drugs on the night of the murder. After the murder, D.B. drove Wenger's truck away from the scene and hid it in a nearby alley. D.B. also attempted to dispose of the murder weapon by selling it. D.B. bragged about the details of the murder to friends in jail and laughed when asked about it. These facts weigh heavily against D.B.'s character. As a result, we cannot say D.B.'s sentence is inappropriate in light of his character.

D.B. bears the burden of demonstrating the inappropriateness of his sentence, and he has failed to do so. Although he was only thirteen at the time of the murder, his life was heading full speed down a dangerous path. The trial court ordered D.B. to serve the advisory sentence executed at the Department of Correction and added an additional five years of supervised probation. The trial court advised D.B. to use this time to pursue an education and addictions counseling so he would be prepared to reenter society as a productive citizen. His sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

The trial court did not abuse its discretion when it denied D.B.'s motion for a mistrial or when it admitted evidence that D.B. possessed a handgun prior to the murder. In addition, D.B.'s sentence is not inappropriate in light of the nature of his offense and his character. Therefore, we affirm his conviction and sentence.

Affirmed.

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