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IN THE
COURT OF APPEALS OF INDIANA

TYRONE R. MORRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0701-CR-29
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0601-FB-2

July 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tyrone Morris ("Morris") appeals his conviction for armed robbery, a class B felony, and the trial court's order awarding restitution.

We affirm in part, reverse in part and remand.

ISSUE

1. Whether the evidence was sufficient to sustain the conviction.
2. Whether the trial court erred when it ordered Morris to pay restitution.

FACTS

On February 17, 2005, at approximately 11:00 a.m., Corey Bailey ("Bailey") dropped off Nicholas Pippin ("Pippin"), Brandon Pryor ("Pryor"), and Donald Wolfford ("Wolfford") at the Michiana Credit Union ("Credit Union") in Elkhart County. Subsequently, Tyrone Morris ("Morris") drove to the Credit Union, parked on a street near the Credit Union and waited outside in a blue car.

In the meantime, Pippin, Pryor, and Wolfford entered the Credit Union and Pippin pointed a gun at a loan officer, while Pryor and Wolfford ordered the branch manager and one of the tellers into the vault. Pryor and Wolfford instructed the employees to fill black garbage bags with money and to "hurry the f*** up or be killed." (Tr. 24, 26). All of the employees were afraid and believed that the men were armed and would kill them if they did not do as instructed.

Immediately after receiving the money, the three men fled from the Credit Union. Elkhart police officers, Michael Sigsbee and Lieutenant Converse,[1] saw the men fleeing

[1] Lieutenant Converse full name is not mentioned in the transcript.

from the Credit Union and ordered them to stop. Pryor and Wolfford stopped, but Pippin ran to Morris' blue car and attempted to open the car door. However, before Pippin could get into the car, Morris sped away; so, Pippin continued running on foot.

Eventually, officers captured Pippin. Nearby, a pellet gun was found in the snow, and identified as the weapon used during the robbery. Officers eventually recovered $147,920 in stolen money. (App. 87). Detective Brent Coppin interviewed Wolfford at the police station, and Wolfford identified Morris as "the get-away driver" and Bailey as the "drop off" driver. (Tr. 142, 143). It was later learned that the blue car belonged to Morris' mother.

At trial, Wolfford testified as to Morris' involvement in the offense and again identified Morris as the person who left the scene of the crime in the blue get-away car. The jury convicted Morris and the court sentenced him to twelve (12) years of incarceration; however, the court ordered that two (2) years of the sentence be suspended on probation pursuant to standard terms. The trial court also ordered Morris, as a term of his probation, to pay restitution in the sum of $147,920, less any amounts paid by any co-defendant or any amounts recovered by the police and restored to the victim.

DECISION

1. Sufficiency

Morris contends that the evidence was insufficient to sustain the conviction of armed robbery, a class B felony. When addressing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McHenry v. State,* 820 N.E.2d 124, 126 (Ind. 2005). Moreover, we "must consider only the probative

evidence and reasonable inferences supporting the verdict." *Id.* Thus, we "must affirm" if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* A person commits the crime of robbery when he:

> (1) knowingly or intentionally takes property; (2) from another person or from the presence of another person; (3) by using or threatening the use of force on any person; or (4) by putting any person in fear. The offense is a class B felony if it is committed while armed with a deadly weapon.

I.C. § 35-42-5-1.

During the course of trial, Wolfford testified that Morris was involved in the robbery but left the scene in a blue car when the police arrived. The evidence is sufficient to support Morris' conviction.

However, Morris also argues that the State failed to establish that the pellet gun used during the robbery was a deadly weapon. Indiana Code Section 35-41-1-8 defines deadly weapon, in relevant part, as a "loaded or unloaded weapon, or as a destructive device . . . 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." *Merriweather v. State*, 778 N.E.2d 449, 457 (Ind. Ct. App. 2002). Serious bodily injury is defined as "bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain . . . or impairment of the function of a bodily member or organ." I.C. § 35-41-1-25.

In *Whitfield v. State*, 699 N.E.2d 666, 670 (Ind. Ct. App. 1998), *trans. denied*, this court held that a disabled pellet gun that was used in a threatening manner and placed the victims in fear was a deadly weapon. The court also noted that "[a] weapon need not be

loaded or operable to meet the definition of a deadly weapon." *Whitfield*, 699 N.E.2d at 671. A defendant is criminally liable for the use of a deadly weapon by an accomplice that reasonably puts another in fear. *See Merriweather*, 778 N.E.2d 449 at 457 (pellet and BB guns are considered deadly weapons due to the serious injury that can be inflicted from the use of the weapon).

The evidence in this case established that at least one of the men used a pellet gun in a threatening manner and put the employees of the Credit Union in fear. Therefore, we find that sufficient evidence supports Morris' conviction.

2. Restitution Order

Morris argues that the restitution order that was entered by the trial court is erroneous because (1) it "misstate[d] the amount owed," and (2) there had been no inquiry into his ability to pay restitution. Morris' Br. at 6. The State concedes that the restitution error is erroneous because there "was no evidence of the Credit Union's actual loss," and "an order of restitution without evidence of" the amount of actual loss incurred is error. State's Br. at 7.

We find *Smith v. State*, 471 N.E.2d 1245, 1248 (Ind. Ct. App. 1984), *reh'g denied, trans. denied*, to be directly on point with Morris' argument. In *Smith*, we held that the statute authorizing the trial court to order restitution "implies that restitution must reflect actual loss incurred by a victim." Moreover, the amount of actual loss is a factual matter which can be determined only upon presentation of evidence." *Id.* Because there was insufficient evidence in the record to support the court's restitution order, we remanded for a determination of the victim's loss "based upon evidence." *Id*. *See also Batarseh v.*

State, 622 N.E.2d 192, 196 (Ind. Ct. App. 1993), *reh'g denied*, *trans. denied*, (citing *Smith* and holding that the amount of restitution order appeared "in excess of the actual loss proved"); and *T.C. v. State*, 839 N.E.2d 1222, 1227 (Ind. Ct. App. 2005), *reh'g denied,* (applying juvenile statute, holding "an inadequate factual basis for the trial court's restitution order," and remanding for "another restitution hearing to determine the amount of [the victim]'s actual damages.").

Further, Smith also argued that the trial court erred in failing to inquire into her ability to pay restitution. *Id.* at 1249. We found that the record "reveal[ed] no inquiry into Smith's ability to pay," and that the trial court "must inquire into the defendant's ability to pay before fixing the amount and payment terms of restitution." *Id*. Therefore, we also ordered that, on remand, the trial court inquire into her ability to pay. *Id*.

As the State concedes, there was no evidence of the Credit Union's actual loss introduced at trial. The only evidence presented on this matter concerned the amount of money recovered after the robbery. Therefore, we remand for a determination of the actual amount of loss suffered by the Credit Union and for inquiry into Morris' ability to pay restitution.

Affirmed in part, reversed in part and remanded.

KIRSCH, J., and MATHIAS, J., concur.