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**IN THE  
COURT OF APPEALS OF INDIANA**

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J.B. WHITELOW,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 45A05-1009-CR-586

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Diane Ross Boswell, Judge  
Cause No. 45G03-0810-MR-7

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**August 15, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issues

J.B. Whitelow appeals his convictions of murder, a felony, and attempted battery, a Class C felony, and his adjudication as an habitual offender. He raises four issues for our review. We restate the first three issues as whether the trial court erred in permitting the following to be entered into evidence: a pre-trial statement by Whitelow to a witness who testified at trial, a witness's lay opinion testimony, and evidence of Whitelow's prior conviction of armed robbery with a firearm. We restate the fourth issue as whether the State presented sufficient evidence to sustain his conviction of attempted battery. We conclude the trial court did not err in admitting the challenged evidence, and the evidence presented was sufficient to sustain his conviction. Therefore we affirm.

## Facts and Procedural History

In September 2008, an errantly thrown lemon slice mixed with hot tempers, leading to a scuffle and shooting death outside a bar in Hammond. Sometime between two and three o'clock in the morning on September 21, a bartender threw a slice of lemon to get the attention of a male patron, but by mistake hit Darnell Jones (a.k.a. "Dada"). Dada became angry, threw a glass, and was escorted out by Rob Moore (a.k.a. "House"), one of the bar's security guards. Upon exiting, Dada began to argue with House and Eric Lowe (a.k.a. "Herc"), another security guard. House and Herc followed Dada to his car, and Dada then swung open his car door, hitting Herc with it. House and Herc decided to detain Dada and call the police, and struggled to pull him from the car.

At this time House heard screaming nearby, saw a woman restraining a man he later identified as Whitelow, heard a gunshot, and then ducked behind a car parked next to Dada's. House then darted toward his own car to retrieve a gun, but en route

remembered his gun was not in his car and instead ran back to the bar, where he alerted the other security guards to the shooting and told them to call 911. House then saw Herc begin to chase Whitelow.

Keith Berry (a.k.a. “Butch”), another security guard, also saw Herc chase Whitelow, and saw Whitelow point a gun and shoot Herc in the head. Butch ran up to Whitelow, put him in a headlock, and was lying on the ground holding Whitelow’s head and neck while someone else kicked Butch in the head repeatedly and yelled at him to let go of Whitelow. At least one other joined the scuffle and yelled at Butch to let go of Whitelow. Herc died of his injuries.

Rodreon Jones accompanied Dada to the bar that evening and knew Whitelow. After the gunshots and scuffle, of which she personally saw and heard some but not all of what happened, she called Whitelow’s cellular phone and asked him why he shot the security guard. He said “I didn’t do that. I got blood all over my shirt and my pants,” and then hung up. Transcript at 299 (testimony of Jones).

Over a period of months in early 2009, Whitelow described the incident to Brandon Humphrey three or four times. Whitelow told Humphrey that his sister’s child’s father, Dada, was kicked out of the bar and was being hassled by a security guard, so Whitelow told the security guard to stop. Whitelow told Humphrey that a scuffle between him and the security guard ensued, during which Whitelow pulled out a gun and shot the guard three times. Whitelow told Humphrey he ran from the scene and burned his clothes. Whitelow also told Humphrey that the only witnesses were his sister’s child’s father and a second security guard, and that “if he got rid of both of them, that that

[sic] was [sic] the only people that could convict him in this case.” Id. at 1037 (testimony of Humphrey).

Whitelow was arrested, trial ensued, and a mistrial declared. A second trial followed, and the jury found Whitelow guilty of murder of Herc, a felony, not guilty of attempted murder of House, guilty of attempted battery of House as a Class C felony, and not guilty of battery of Butch. Whitelow then stipulated to being an habitual offender, which was attached to his murder conviction. The trial court held a sentencing hearing, and sentenced Whitelow to consecutive sentences of fifty-five years for murder, four years for attempted battery, and thirty years for being an habitual offender, for a total of eighty-nine years in prison. Whitelow now appeals. Additional facts will be supplied as appropriate.

### Discussion and Decision

#### I. Admission of Evidence

##### A. Standard of Review

We review a trial court’s decision to admit evidence for an abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 546 U.S. 1108 (2006). We will find an abuse of discretion when its decision is “clearly against the logic and effect of the facts and circumstances before it.” Id. However, even if we find an abuse of discretion in the admission of particular evidence, we will not reverse unless the defendant’s substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 548 U.S. 910 (2006).

## B. Whitelow's Statement to Jones

Whitelow first challenges the trial court's decision to allow into evidence, over his objection, Jones's testimony<sup>1</sup> that Whitelow told her "nobody was going to testify against him because everybody was scared of him."<sup>2</sup> Tr. at 307 (testimony of Jones). Whitelow argues this statement is ambiguous, so the prejudicial effect of suggesting his intention to threaten or kill witnesses outweighs its probative value. We agree that this statement is ambiguous to the extent it does not clearly constitute a threat against those individuals or his intent to threaten or harm them. However, its ambiguity also lessens the prejudicial effect. Statements suggesting that Whitelow may intend to kill witnesses were admitted into evidence through the testimony of at least one other – Humphrey, who indicated Whitelow might "g[e]t rid of . . . the only people that could convict him in this case." Tr. at 1037 (testimony of Humphrey). Jones's testimony, on the other hand, merely suggests people were scared of Whitelow generally. This could be harmful to a jury's view of Whitelow, but is not so prejudicial that it constitutes an abuse of discretion. This decision by the trial court certainly did not substantially affect Whitelow's rights.

## C. Humphrey's Lay Opinion

Whitelow next argues the trial court erred in allowing Humphrey to testify that in his lay opinion, Whitelow meant that he intended to kill two witnesses when he told Humphrey that if he "got rid of" the only two witnesses to the shooting then he could not

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<sup>1</sup> Whitelow's appellate brief discusses "recordings of telephone conversations." Appellant's Brief at 14. In the portion of the transcript he refers us to, however, Jones testifies regarding a telephone conversation, but no recording is mentioned or admitted into evidence.

<sup>2</sup> Whitelow's appellate argument refers to "statements," indicating he objects to more than one statement. However, his appellate brief does not specify any statements, and our only indication that he objects to this statement by Jones is his single citation (but no quotation or paraphrase) in his brief to this portion of the trial transcript.

be convicted. Tr. at 1037. At trial, Humphrey testified Whitelow told him “the only two witnesses [to the shooting] was [sic] his sister’s baby’s father, Dada, and the other security guard that was there at the time, and that if he got rid of both of them, that that [sic] was [sic] the only people that could convict him in this case.” Id. at 1036-37 (testimony of Humphrey). The State then asked Humphrey what he understood that statement to mean, and after the trial court overruled Whitelow’s objection, Humphrey answered: “It means to get rid of them,” “[t]o kill.” Id. at 1037.

Whitelow concedes Humphrey’s testimony was admissible as lay opinion under Evidence Rule 701, but contends Humphrey’s own understanding is irrelevant, concerns a matter of law, concern’s another’s intent, and that the prejudicial effect outweighs the probative value.

“‘Relevant evidence’ means 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.” Evid. R. 401. Humphrey’s opinion is relevant because it suggests that Whitelow might consider himself to be guilty; this makes his guilt more probable than without the evidence. Admittedly, Humphrey’s opinion is not necessarily an accurate portrayal of whether Whitelow considered himself guilty; it concerns what Humphrey understood Whitelow’s statement to mean, and cannot be for certain what Whitelow meant. However, this testimony satisfies the requirements for lay opinion because Humphrey knew Whitelow well, so his opinion is rationally based on Whitelow’s statement and his opinion of what Whitelow meant. See Evid. R. 701. Lay opinion is admissible that is “(a) rationally based on the perception of the

witness and (b) helpful to a clear understanding of . . . the determination of a fact in issue.” Id.

Whitelow’s contention that Humphrey’s opinion concerns a matter of law is premised on Whitelow’s assumption that for Humphrey’s opinion to be relevant, “it must be interpreted as a threat against witnesses.” Brief of the Appellant at 16. It is true that opinion testimony on an issue of law is improper. Butler v. State, 658 N.E.2d 72, 79 (Ind. 1995). But Humphrey’s opinion need not be interpreted as Whitelow’s threat against witnesses; it is relevant as his opinion of what Whitelow, whom he knows well, meant by a particular statement. This is an opinion as to a fact, not the law.

Evidence Rule 704(b), concerning opinion testimony on an ultimate issue, states: “Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.” Humphrey’s opinion testimony at issue concerned Whitelow’s intentions after the incident, so it was not an ultimate issue of guilt or innocence, which Rule 704(b) precludes, i.e., whether Whitelow intended to kill Herc. Further, Humphrey’s opinion concerned Whitelow’s view of his own guilt or innocence; Humphrey did not express his opinion of Whitelow’s guilt or innocence.

The danger of unfair prejudice by allowing Humphrey’s opinion does not outweigh its probative value. The probative value of Humphrey’s opinion lies in its consistency with Jones’s testimony that others were scared of Whitelow, and its support of the State’s theory that Whitelow was trying to cover up his shooting in the period before and even after he was apprehended. The trial court did not err in allowing Humphrey’s lay opinion testimony.

## D. Evidence of Prior Conviction

Whitelow also alleges the trial court abused its discretion in allowing the State to characterize his Illinois conviction of Armed Robbery with a Firearm as being “[a]rmed with a firearm.” Br. of the Appellant at 18; Tr. at 1241 (phrased as “armed robbery with a firearm” by the trial prosecutor). The Pre-Sentence Investigation Report lists the relevant offense as “ARMED ROBBERY/ARMED WITH FIREARM (FELONY).” Pre-Sentence Investigation Report at 4.

Whitelow concedes his conviction is admissible under Indiana Evidence Rule 609, but challenges admission of the full statutory title, arguing it unfairly prejudices him because it also refers to a shooting thereby suggesting he is disposed to committing crimes with firearms. Evidence may be introduced for one purpose and not another, and here evidence of his conviction of armed robbery with a firearm was properly admitted. In Jenkins v. State, 677 N.E.2d 624, 626-27 (Ind. Ct. App. 1997), we explained that evidence of a prior qualifying conviction is mandatory under Evidence Rule 609(a), and does not rest within the discretion of the trial court and is not subject to Rule 403. Here the conviction was not introduced to demonstrate his disposition for committing offenses with firearms, but to impeach his credibility. The trial court did not err.

## II. Sufficiency of the Evidence

### A. Standard of Review

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or reweigh the evidence, and we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). When confronted with conflicting evidence, we must consider it in a light

most favorable to the conviction. Id. We affirm the conviction “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. . . . The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quotations and citations omitted).

### B. Attempted Battery

To convict Whitelow of attempted battery as a Class C felony, the State was required to prove that Whitelow “engage[d] in conduct that constitutes a substantial step toward commission of,” Ind. Code § 35-41-5-1, the requisite degree of battery, which is the “knowing[] or intentional[] touch[ing] [of] another person in a rude, insolent, or angry manner,” Ind. Code § 35-42-2-1(a), that “results in serious bodily injury to any other person or . . . is committed by means of a deadly weapon,” Ind. Code § 35-42-2-1(a)(3).

Whitelow concedes at least some evidence presented suggests a reasonable inference that he knowingly or intentionally pointed and fired a gun at a scuffle of individuals which included House. Whitelow argues that this evidence supports a reasonable inference that he attempted to scare people or break up the scuffle, but no more. We decline this invitation to reweigh the evidence, and conclude the evidence presented is sufficient to sustain his conviction of attempted battery.

### Conclusion

The trial court did not err in its admission of evidence, and the evidence presented is sufficient to sustain Whitelow’s conviction of attempted battery as a Class C felony. Therefore, Whitelow’s convictions are affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.